APPENDIX.

ARBITRATION BOARD DECISION.

In the matter of:	
Needham Packing Company, Inc., Sioux City, Iowa, and **Local No. 721, United Packinghouse, Food and Allied Workers of America, AFL-CIO.**	**FMCS File No. 64A/4419.**

Appearances:

For the Company

James A. Gilker, Attorney
Charles R. Garner, Attorney
Charles R. Wolle, Attorney

For the Union

Richard F. Watt, Attorney
Irving King, Attorney
Harry H. Smith, Attorney

Preliminary Recital:

The Supreme Court of the United States held unanimously in March, 1964, that the Company was not released from its duty to arbitrate the two related grievances that are the subject of the instant proceeding on the basis of the Union's having breached the contract's no-strike clause.

The introductory portions of the Supreme Court's Opinion (delivered by Mr. Justice Harlan) serve admirably to outline certain basic circumstances. They are, therefore, set forth below, with the exception of two footnotes (Joint Exhibit 9):

This case, which was brought here from the Supreme Court of Iowa, 374 U. S. 826, presents a problem concerning the relationship between an arbitration clause and a nostrike clause in a collective bargaining agreement.

Although this case comes to us on the pleadings and some disputed questions of fact are still to be resolved, we accept as true the following facts for the purposes of our decision. The petitioner, Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO, and the respondent, Needham Packing Co., had an agreement which included provisions of both kinds, set out hereafter. On May 11, 1961, Needham discharged Anton (sic) Stamoulis, an employee represented by the union. In response, on the same day about 190 other employees left work. During the next few days Needham advised the employees to return to work, stating that if they did not their employment would be regarded as terminated and that the discharge of Stamoulis would be treated under the grievance procedures of the collective agreement. The employees did not return to work.

On July 5, 1961, the union presented to Needham written grievances on behalf of Stamoulis and the other employees, asserting that they had been "improperly discharged" and requesting their reinstatement with full seniority rights and pay for lost time. By letter dated July 11, 1961, Needham refused to process the grievances. The letter stated that the union and its members had by their conduct "repudiated and terminated the labor agreement" with the company. In addition, Needham stated that it would not have further dealings with the union and did not recognize the union as majority representative of Needham employees.

This suit by the union under Section 301 (a) of the Labor Management Relations Act, 29 U. S. C. Section 185 (a), to compel arbitration of the two grievances followed. Needham alleged as a defense that the union and its members had struck on May 11, 1961, and that this breach of the nostrike clause of the collective bargaining agreement had been and was treated by Needham as having terminated its obligations under the agreement. In addition, Needham filed a counterclaim, alleging that it had been damaged in the amount of $150,000 by the union's breach of the nostrike clause. The union denied such breach. At the close of the pleadings, in accordance with Iowa procedure, Needham moved for a ruling on points of law and a final order denying the union's petition to compel arbitration.[1] Deciding solely on the basis of matters raised in the pleadings as to which there was no dispute, the trial court ruled in Needham's favor and issued an order against the union. The union obtained an appeal. The Supreme Court of Iowa affirmed the holding below that "the Union had waived its right to arbitrate the grievances filed by its walkout." 119 N. W. 2d 141, 143.[2]

In the present posture of this case, we must answer the question whether acts of the union relieved Needham of its contractual obligation to arbitrate almost entirely on the basis of the agreement itself. We think it plain that, seen from that perspective, the judgment below must be reversed.

The Supreme Court found no basis for distinguishing the present case from *Drake Bakeries* (370 U. S. 254) which the Court found to be controlling here. Mr. Justice Harlan's Opinion makes clear, however, that the Court need not decide whether a "fundamental and long-lasting change in the relationship of the parties prior to the demand for arbitration would be a circumstance which, alone or among others, would release an employer from his promise to arbitrate" because the "undeveloped record" before the Court reveals no such circumstance.

Pursuant to the Supreme Court's decision reversing and remanding the case to the Iowa Supreme Court for further proceedings, Grievance Nos. 1-A and 2-A are now properly before a three-man Board of Arbitration as provided for in the 1960-1961 contract between the parties (Joint Exhibit 1) and pursuant to an order directing such arbitration issued on May 15, 1964, by Iowa District Court Judge George M. Paradise for Woodbury County (Joint Exhibit 14).

Judge Paradise's order directs the Company to submit the instant grievances to arbitration pursuant to the terms of the contract (Joint Exhibit 1) and enjoins the Company "from failing or refusing to comply with the arbitration provisions of said Collective Bargaining Agreement with respect to Grievances 1-A and 2-A."

Subsequent to Judge Paradise's order, the Company named Jesse E. Marshall, Sioux City, Iowa attorney, as its arbitrator. The Union in its initial request for arbitration in 1961 had named Charles H. Fischer of Chicago, Illinois, as its arbitrator (Joint Exhibit 7). The third member of the Arbitration Board, Harold W. Davey of Ames, Iowa, was selected from a panel furnished by the Federal Mediation and Conciliation Service to serve as the impartial member and chairman.

A hearing was held on Grievance Nos. 1-A and 2-A at the Sheraton-Warrior Motor Inn, Sioux City, Iowa, on November 30, 1964, and on December 1, 4, 5, and 6, 1964. A verbatim record of the proceedings was made by Wesley V. Hart, certified shorthand reporter. The transcript of the hearing is 971 pages. Post-hearing briefs were filed simultaneously in timely fashion on March 22, 1965, after two extensions of filing time had been granted by the Arbitration Board Chairman.

The Board of Arbitration met in executive session at the Hotel Savery, Des Moines, Iowa, on April 9, 1965. The agreed purpose of the executive session was to permit Board members Marshall and Fischer to make such final comments to the Chairman as they desired.

No proposed decision was discussed. The Arbitration Board Chairman had indicated at the hearing that he would listen to such comments as the other two Board members wished to make in executive session but would himself refrain from making any remarks concerning the merits of disputed issues.

In its executive session on April 9, 1965, the Arbitration Board agreed that the Chairman should make clear at the outset that he is writing the majority opinion and refer to himself thereafter as the Chairman to underline this point.

The Arbitration Board further agreed that because of the importance of this proceeding the Chairman should prepare an Opinion to accompany the Award which would treat all relevant matters "fully but economically."

The record in the case was closed on April 9, 1965. By agreement, the Chairman was given 60 days instead of the customary 30 days to study the record and prepare the text of the Opinion and Award, and additional time if necessary, in view of the length of the record and the number of exhibits. On May 19, 1965, the Chairman requested an extension of time for filing the decision from June 9, 1965, to July 9, 1965. On July 3, 1965, the Chairman requested a second extension of time from July 9, 1965 to July 23, 1965. Both requests were approved in terms of the understanding expressed by the parties at the conclusion of the hearing on December 6, 1964 (Transcript, pp. 970-971).

The Chairman's task of preparing the Opinion has been made less difficult than might otherwise have been the case because of the thoroughness and economy of the presentations by counsel for both parties and because of the excellent quality of the transcript furnished by the reporter. The Chairman wishes to record formally his appreciation for the courteous and capable conduct of the other two members of the Board of Arbitration and of counsel for both parties.

In the Arbitration Board Chairman's view, understanding will be facilitated if we insert at this stage of the Opinion a summary chronology of pertinent facts, events and circumstances prior and subsequent to the filing of Grievance Nos. 1-A and 2-A. The chronology is not intended to be a full or complete recital of all pertinent matters. Some key points given only a short paragraph or perhaps omitted in the chronology will be treated more fully at the appropriate place elsewhere in this Opinion. The chronology is intended primarily as a skeletal matrix in which to place the ensuing detailed consideration of relevant contentions, testimony and evidence.

In writing the chronology and also in other sections of the Opinion, the Chairman has condensed uncontroverted material in his own words in the interest of a more economical presentation. Furthermore, generally speaking, specific page references to the transcript or to exhibit numbers are made only in treatment of disputed matters or when quoting directly from either testimony or exhibits.

Testimony for the Company was offered by the following (listed in the order called): 1) Henry Meyer, foreman of the kill floor; 2) Lloyd L. Needham, president and general manager of the Company; 3) Wayne Tucker, foreman of the cooler in May, 1961; 4) Gerald Miller, assistant kill floor foreman in May, 1961; and 5) James A. Gilker, labor relations attorney advising the Company in May, 1961, and thereafter, and principal counsel for the Company in the present arbitration proceeding.

Testimony for the Union was offered by the following (listed in the order called): 1) Jack Ohl, whose job was pulling tails on the kill floor in May, 1961; 2) William Porter, whose job was backing cattle on the kill floor in May, 1961; 3) Clayton Johnson, whose job was driving and shackling cattle on the kill floor in May, 1961; 4) Antona Stamoulis, chief steward of Local 721 and beef header in the beef kill in May, 1961 (Stamoulis is the grievant in Grievance No. 1-A in the instant proceeding); 5) Emery Hines, president of Local 721 and manifest man in the cooler in May, 1961; 6) Dave Hart, director of District No. 3 of UPWA; 7) Paul R. Gomez, rumper in the beef kill in May, 1961; 8) Ralph Helstein, international president of the Union; 9) Arthur J. Stokes, Jr., beef roller in the beef cooler in May, 1961; 10) Donald Verschoor, whose job was high trim on the beef kill in May, 1961; and 11) Richard Weathers, whose job was beef scaler in May, 1961, and who was a trustee and member of the bargaining committee for Local 721.

All witnesses testified under oath. Needham, Miller, and Gilker testified as rebuttal witnesses for the Company following presentation of the Union's direct case. Hines testified on rebuttal for the Union following the Company's rebuttal witnesses.

Chronology of Pertinent Events and Circumstances Prior and Subsequent to the Filing of Grievance Nos. 1-A and 2-A:

1) The plant in question was put into operation as a new plant in September, 1954, under the name of Sioux City Dressed Beef Company. Lloyd L. Needham had been a vice president of Sioux City Dressed Beef Company and in 1960 became president and general manager of Needham Packing Company which acquired Sioux City Dressed Beef Company in that year. The plant seniority list for December 5, 1960 (Union Exhibit 18), indicates that the seniority of approximately 86 employees goes back to 1954 or 1955 and approximately another 89 have plant seniority dating from 1956, 1957, 1958, or 1959. The most recent hires listed in Union Exhibit 18 were for October, 1960.

The total of names shown on Union Exhibit 18 is 201 employees. Approximately 183 of these are grievants on Grievance No. 2-A.

2) The Union was certified by the National Labor Relations Board as exclusive bargaining representative for all production employees during the summer of 1960. The parties negotiated a first contract that became effective October 1, 1960 (Joint Exhibit 1). Needham himself took no part in negotiation of this contract. Apparently, the principal negotiators for the Company were Robert Anderson, an Omaha, Nebraska attorney, and Jerry P. Kozney, sole signer of the contract for the Company as its vice president (Joint Exhibit 1). Signatories for the Union were its International president, Helstein; the secretary-treasurer for the International, G. R. Hathaway; Field Representative John Davidchik (now deceased); and six members of the Local 721 Committee, namely, Weathers, Stamoulis, Hines, Alex Thomas, Henry Hofeldt and Vergil Sherman.

3) Needham was absent from the Company due to illness from November 18, 1960, until April 14, 1961, during which time a Mr. Harold Yaffee served as president of the Company. Needham testified that he had no contact with Company problems during his illness, except for conferring a few times with Kozney prior to leaving Sioux City for convalescence in Florida.

4) Testimony of several Union witnesses, not refuted by any Company witness, indicates that between October, 1960, and Needham's return to active duty in April, 1961, labor relations problems or grievances were handled in a highly informal manner on the spot or in the office with no grievances ever being written up. Kozney and William Read, plant superintendent, were primarily responsible for labor and industrial relations problems during this period, according to Needham (Transcript, p. 276). Read

and Ernie Maier, assistant to Read, apparently handled most labor relations matters for the Company between October, 1960, and Needham's return in April, 1961.

5) A document entitled "Rider to Union Contract," introduced as Union Exhibit 13, states in part that "One hundred cattle per is the basis agreed on by union and the company with chain speed set at 126." This "rider" is dated April 4, 1961, and bears the signatures of Read and Stamoulis.

6) Needham testified that while he was away the plant had only one problem to amount to anything, namely, low production. Needham further testified that in the first three weeks following his return on April 14, 1961, he succeeded in doubling production. He stated, "We were running 32 or 35 hundred and I ran it up to 55 hundred within 3 weeks, which was normal for us." (Transcript, p. 321).

7) Upon his return, said Needham, he was bothered by the low production and by the frequency of meetings on grievances during working hours. Needham decided on the basis of their past performance that Kozney, Read, and Maier were not capable of handling grievances beyond the second step (Transcript, pp. 326-327).

8) Needham testified that after he decided he needed some advice he recalled a speech he had heard Gilker make at a convention in Chicago of the National Independent Packers Association. He could not recall Gilker's name but obtained it from the executive secretary of the Association. Gilker first came to Sioux City on Tuesday, May 9, 1961.

In explaining his conclusion that he needed the assistance of someone such as Gilker, Needham testified as follows on cross-examination (Transcript, pp. 280-281):

> Q. (By Mr. Watt): You determined then sometime in late April following your return from your con-

valescent period in Florida that you needed some advice and you remembered Mr. Gilker, found out how to get in touch with him, and called him?

A. Right.

Q. What was it that led you to conclude you needed the assistance of someone such as Mr. Gilker?

A. Well, we had a lot of static in these grievances. We weren't getting our production up. The Company was unhappy. The employees were unhappy, apparently so, and when I called Mr. Gilker I told him that we had problems up here, but I didn't know why. I wanted him to come up and sit in on some grievance meetings and see what he thought of it.

I didn't want to make any moves that weren't right the way it was for us because we were constantly in a jangle with these meetings, which I felt as though most of them were unnecessary, and I wanted to get the best advice I thought I could get, and, as I say, Mr. Gilker did impress me with the speech he gave at this meeting.

I didn't know where to turn to. I thought I would start with him, have him come up and see what he thought of the situation, and he couldn't come up—I had to leave right away. He could have come up right away, but I couldn't be here and when I could get back, it wound up Tuesday. We had a definite arrangement for him to be there Tuesday. He was going to be there at 8:30 and as late as lawyers usually are, he got there at 4.

Q. Had you considered talking to your attorney who had served you at a previous time, Mr. Anderson, about the problems you discovered you had at the plant?

A. No, because I didn't want to talk to him about them until I got some ideas from Mr. Gilker because I was actually checking on—I was having a contact and checking to see whether Mr. Anderson was heavy enough to continue with it or not because we were faced with many problems that were very distasteful to everyone.

9) On Monday afternoon, May 8, 1961, Needham stated he met with the Union Committee in the conference room at the plant. His recollection is that "we had six grievances and they were all cleaned up to everyone's satisfaction." (Transcript, p. 93). Stamoulis testified that there was no grievance meeting with Needham on May 8 (Transcript, p. 500).

10) On Tuesday morning, May 9, Needham's testimony is that he encountered Stamoulis between 7 and 8 by the coffee machine and asked him why he wasn't on the job. Stamoulis told him that there had to be a meeting right away. Needham testified that he couldn't understand this because he thought any pending grievances had been cleaned up the day before. Stamoulis told Needham that there were 22 more. Needham said this was "ridiculous," adding that Tuesday was a very busy day with a big run of cattle. He indicated that he couldn't drop everything and talk any time the Union Committee wanted to and walked away from Stamoulis (Transcript, pp. 94-96).

11) Later on the morning of May 9, the foreman of the kill floor, Henry Meyer, reported to Needham that the Union Committee had stated if he didn't meet with them by 12:30 that day the plant was "going out." Employees did, in fact, leave the plant around 12:30 on May 9. Needham got the word out in some fashion that he would meet with the Union Committee at 4 p.m. that day.

12) At approximately 4 p.m., Gilker arrived at the plant. He was informed about the walkout and immediately placed calls to Davidchik and then to Helstein in Chicago to secure the latter's aid in getting the men to return to work. Gilker arranged with Davidchik to meet with the Union Committee that same night at which time a number of grievances were taken up. Employees were contacted by phone to report Wednesday morning and those who could not be reached were sent wires by the

Company. The employees returned to work Wednesday morning, May 10.

13) Gilker acted as chief spokesman for the Company during the Tuesday night meeting. He stressed to the Union Committee the necessity for following the contract procedures on handling grievances (for text of paragraph 33, see *infra*). Needham and Gilker both testified that at the meeting on May 9 and on other occasions, Emery Hines, president of Local 721, referred to "hitting the bricks" if the Union was not satisfied with Company answers on grievances. The testimony of Needham was also to the effect that Richard Weathers, member of the Union Grievance Committee, said on May 9 and subsequent occasions that the Union wasn't "going to arbitrate every god damned little thing that came up." (Transcript, pp. 103, 112).

14) Wednesday, May 10, appears to have been a normal production day. Needham and Gilker met with the Union committee that afternoon. Davidchik also attended this meeting. On this occasion six grievances were, in fact, written up (Union Exhibits 1 through 6) and were answered in writing by the Company in a letter from Ernie Maier to Stamoulis (Union Exhibit 7) dated the following day (May 11, 1961).

15) On Thursday morning, May 11, Hines discussed with the Company a Union demand that a hot meal be furnished to men who were working unusually long hours in the cooler. Gilker and Davidchik apparently spent considerable time on the phone that morning discussing this matter (see testimony of Davidchik in unemployment compensation hearing, Union Exhibit 12). The record indicates the Company had no facilities at the time for providing such a hot meal but did recognize there was a problem that needed to be worked out. Hines testified he was told by his foreman that Gilker had indicated he could go

out to supper but that if he took longer than 30 minutes he would be discharged (Transcript, p. 577).

16) Shortly after the noon meal break, the most critical incident pertinent to the instant proceeding took place. Foreman Meyer assigned his assistant foreman, Miller, to fill in on the line for a bargaining unit employee. Meyer indicated he was short because of the failure of Al Skarnilus to return in timely fashion from City Hall where he had gone on some tax matter. According to Meyer, the necessity to use Miller arose when he had to put Verschoor into the cooler to push cattle, thus leaving a spot to fill on the trim-out bench.

17) Stamoulis protested the use of Miller on a production job as a violation of contract. He was told by Meyer it was an emergency because he was a man short. Stamoulis disputed this and threatened to shut down the line, according to Meyer. Meyer went up to the office for advice. He was told by Gilker to tell Stamoulis that he should follow the grievance procedure but that if he stopped the chain Meyer was to discharge him. Meyer's testimony is that when he told Stamoulis this, Stamoulis waved his arms and said, "Stop the chain." Stamoulis denies having stopped the chain or having caused the chain to be stopped. It is not disputed that the chain in fact was stopped and production halted.

18) A brief session was held thereafter involving the Union Committee, Gilker and Needham during which time killing began again and production resumed. The Committee demanded Stamoulis' reinstatement. The Company maintained that his discharge would stand and indicated it would not reinstate Stamoulis unless ordered to do so by an arbitrator. The Union Committee left the room and the kill again stopped. Unfinished work was completed and the men then proceeded to leave the plant. Foreman Meyer

was instructed to tell each man individually that if he left his work he would be subject to disciplinary action. Maier was sent along to accompany Meyer in carrying out this task. Needham caused several notices to be posted in dressing rooms and other locations indicating there would be work on Friday, May 12. The bargaining unit employees left the plant the afternoon of May 11. None reported on May 12.

19) Gilker again put in phone calls on May 11 to Davidchik and to Helstein as he had done on May 9. Helstein was reached in Des Moines, Iowa, with Dave Hart, the Union's district director. Helstein indicated to Gilker that Hart would leave for Sioux City the next morning. Hart arrived in Sioux City Friday about 1 p.m. and met with Gilker and Needham and the Union Committee around 2 p.m. The Company maintained its original Thursday position. So did the Union Committee. Needham and Hart agree in their testimony that Hart urged Needham and Gilker to give him "something to work with." (At this time Hart was urging that the Company change Stamoulis' discharge to an indefinite suspension.) Needham told Hart at this session that he did not intend to shut down, that he "couldn't wait much longer" before starting to hire help and that satisfactory replacements would not be replaced by the people who were out on strike (Transcript, p. 143). Hart and the Union Committee left the plant with Hart indicating that he would urge the employees at a meeting that night to return to work.

20) Needham and Gilker testified that they waited at the plant until late that evening but heard nothing from Hart or any other Union official. Hart, Stamoulis and Hines all testified that they urged the employees to return to work at the Friday night meeting but the employees were opposed to returning because of the Company's discharge of Stamoulis. After hearing nothing from the

Union, Needham testified that a letter was prepared and mailed to all employees, postmarked Friday at 10:30 p.m. The full text of this letter (Company Exhibit 3) is reproduced at this point because of its critical importance in relation to the disputed issues. Company Exhibit 3 reads as follows:

> "Gentlemen: Because I feel that you may not have had a factual report on the occurrences at the plant the last few days, I felt it would be a good idea to make our position clear.
>
> "We met with Mr. Dave Hart, Mr. John Davidchek and the committee of your local Union this afternoon. We told them that a work stoppage for any reason was in direct violation of our agreement with the Union, and asked them whether or not they intended to instruct each of you to return to work immediately. Mr. Hart, speaking for the International Union and Mr. Hines speaking for the local Union, told us they would instruct the men to return to work in the morning. We do not know whether or not this was done.
>
> "Any work stoppage is a direct violation of our agreement with the Union. Mr. Stamoulis was discharged properly. He was warned that he would be discharged if he stopped the line.
>
> "Any proper grievance can be adjusted under the grievance procedure in the contract. Constant work stoppages make plant operation impossible from the management viewpoint. Such stoppages also cost the employees in lost wages.
>
> "I told Mr. Hart that we wanted the men to report in Saturday, and that if they did not, we would hire other men. I hope you will return to work immediately. ANY NEW MEN HIRED WILL NOT BE DISMISSED TO MAKE ROOM FOR YOU SHOULD YOU DECIDE TO RETURN TO WORK LATER.
>
> "Please give your decision in this matter serious thought. Your decision is very important to you and your families. I hope to have you with us."

21) No contact between the parties took place on Saturday and Sunday, May 13-14, 1961. Hart returned to

Des Moines. Gilker returned to Fort Smith, Arkansas. The record indicates that some employees received Company Exhibit 3 in Saturday's mail. However, the late posting on Friday night meant that many employees did not receive it until Monday, May 15. The record shows that Saturday was a scheduled work day. The plant was customarily operating at this time on a six-day week. The Company operated over the weekend with supervisors and some employees flown in from its Fargo plant on Sunday. No UPWA members appear to have reported for work since Thursday, May 11, 1961, with the exception of two or three, according to Needham's testimony (Transcript, p. 256).

22) Monday noon, May 15, 1961, Needham decided to begin hiring replacements. He called radio and TV stations for advertising spots. He testified that the Company took 210 applications Monday evening, May 15 (Transcript, p. 188) and that 65 of these reported Tuesday morning, May 16 (Transcript, p. 190). Hart called Needham the morning of May 16 and was told by Needham to call Gilker in Fort Smith. Hart testified that he had been called by John Davidchik, field representative, the night before. Davidchik had told Hart about Company Exhibit 3. Hart reached Gilker the morning of May 16.

Testimony concerning the Hart-Gilker May 16 phone conversation is conflicting as to whether they reached an agreement or understanding on how the striking employees would return to work or be returned to work. This matter is dealt with at length later in this Opinion. For purposes of the present chronology, it can be stated here that Gilker maintains that there was no understanding or agreement of the kind Hart contends was reached. Hart maintains that he and Gilker agreed that the Stamoulis case would be arbitrated and that all the other men would be returned to work with full seniority and without discrimination, and that the order and manner of their reporting back would be "worked out." On this understanding, said Hart, he phoned Davidchik to call a special meeting for that evening and urged him to recommend that the employees return to work on Wednesday morning on the basis agreed upon with Gilker.

23) The record shows that Davidchik called Needham around 8 p.m. that night and reported that the Union membership had voted to return to work on the basis described by Hart. Needham told Davidchik that he, Needham, would check with Gilker and call him back. Needham testified that he got back to Davidchik about 9 p.m. and told the latter in substance that the men would have to fill out application blanks and come back in as new hires. Davidchik's testimony as to the substance of his May 16 conversation with Needham is quoted herewith from Union Exhibit 12, pp. 63-65:

> A. My next contact with the company was on Tuesday, May the 16th.
>
> Q. And what would be your purpose in contacting the company?
>
> A. The purpose in contacting the company at that time was because during the intervening period between May the 12th and the evening of May the 16th, that was when my contact was made, there had been a series of discussions between district director, Hart, and several other international officers with Mr. Gilker, regarding this situation. And I was advised by Mr. Hart on the afternoon of May the 16th that because of the conversation being held with Mr. Gilker, the membership should have a special meeting and review their action of the previous Friday because they said that the company was willing to let them all go back on Tuesday with the exception of Stamoulis, and they would take up the Stamoulis case through the grievance procedure.
>
> Q. And what did the union do with reference to this?

A. After a considerable amount of discussion they agreed to accept the offer and go back on that basis, and I was instructed to contact Mr. Needham—

Q. This was on Tuesday night, the 16th?

A. The evening of Tuesday the 16th, to contact Mr. Needham and find out how the people would return to work. Were they all—whether all the departments would come back the same time or they would possibly delay starting one department because of the lack of product or whether they had sufficient number of cattle and the raw product on hand in order to start operation the following morning. (Record turned.)

Q. And you did then contact Mr. Needham?

A. I did.

Q. What was the conversation that you had?

A. Well, Mr. Needham advised me that he knew nothing of any conversation between director Hart, and Gilker. He stated that Gilker was some place down at Fort Smith, Arkansas, and he had been trying to reach him. He knew nothing of any understanding. And as far as he was concerned that the offer that had been made the previous week on Friday for the return of all people with the exception of Stamoulis was no longer in effect, that he had sent out a letter to the employees under the date of May 12th advising them that they would have to return to work on Saturday morning, that the people could come back, they would have to come back in groups of threes. That they would have to make application, they would have to undergo physical examination. They would come back as new employees and be put to work as the vacancy or the opportunity opened up for them to go to work. Also, he stated that there was another factor in the picture because of the fact of certain derogatory remarks made against him, the supervisors had been driving him out of the plant for the intervening period of time between Thursday and Tuesday, that there were certain people that he wasn't going to take back anyway. I raised the question with him about the letter and I advised him that our people hadn't received that letter as of Saturday, that is the majority of them at least. And he said, "That is highly possible because we didn't get it out in the mail until ten-thirty Friday night."

According to Needham, Davidchik replied that he didn't think the men would accept these conditions. Hart testified that Needham's statement to Davidchik was the first time anyone in the Union had been told the men would have to come in as new hires. Hart stated that this was a flat breach of his understanding with Gilker by phone that morning. From that point on, says Hart, he regarded the situation as having changed from an unauthorized strike into a lockout. (Transcript, p. 628.)

24) On the morning of Wednesday, May 17, 1961, the record establishes that there were a large number (around 1,000 people) outside the plant, including many from other companies. Considerable brick throwing, car stopping and tipping, etc., took place. The record is clear that there had been no violence prior to the morning of May 17, 1961. On May 17 there were only seven policemen on hand. The following day (Thursday, May 18) there were about 40 city and county policemen on hand at the start and close of the shift. Order appears to have been well maintained.

25) Also on May 17 the record shows hot and angry phone conversations took place between Gilker on the one hand and Hart and Helstein on the other concerning the alleged breach by Needham of the understanding Hart contends he had reached with Gilker the day before.

26) The next formal contact between representatives of the parties occurred during a hearing in the Iowa District Court for Woodbury County on the Company's application for a temporary injunction to prevent violence and threats of violence. Said hearing took place on May 24, 25, and 26, 1961. The transcript of 328 pages was introduced in the instant proceeding as Company Exhibit 16. An injunction was subsequently granted by the Court.

27) Needham had no further contact with the Union, nor did he seek any, between Davidchik's call on the night of May 16 and a meeting arranged at the Union's request (Hart) held at the Sheraton-Martin Hotel on June 26, 1961. The record shows that in the interim the Union had sought unsuccessfully to obtain the intercession of the Board of Directors of the Sioux City Chamber of Commerce, the Mayor of Sioux City and a number of ministers to attempt to mediate the dispute. The record also shows that in this interim period the Company was successful in replacing the entire complement of bargaining unit personnel. Needham's testimony on this point is not challenged and is quoted herewith (Transcript, pp. 226-228):

> Q. (By Mr. Gilker.) Mr. Needham, now getting back to the weeks ending May 13, May 20, and May 27, was the plant in operation each business day?
>
> A. Yes.
>
> Q. Can you tell us how many employees were on the payroll the week ending the 13th, the week the employees walked out?
>
> A. 287.
>
> Q. Now, what was the makeup of that labor force?
>
> A. About 45 supervisory; 16 engineers, 22 in the boning room, the balance in the rest of the plant.
>
> Q. On May 11, was the Company operating a boning department?
>
> A. Yes.
>
> Q. Subsequent to May 11, did the Company operate a boning department?
>
> A. Yes.
>
> Q. Did they operate one the week ending May 20 and the week ending May 27?
>
> A. No; we never reopened it at that time for many weeks.
>
> Q. In other words, you didn't attempt to bone cattle—
>
> A. No.
>
> Q. —subsequent to May 11?
>
> A. Right.

Q. Now, you testified there were approximately 16 engineers.

A. Right.

Q. Did those men— You testified earlier they were represented by the Operating Engineers Union?

A. Yes.

Q. Did they continue to report for work subsequent to May 11?

A. Yes.

Q. Have they worked continuously from May 11 up to this time?

A. Yes; continuously.

Q. Did the Company have at that time a collective bargaining agreement with the Operating Engineers Union?

A. Yes.

Q. Do you still recognize the collective bargaining rights of the Operating Engineers Union up to this date?

A. Yes.

Q. Has the contract with that union been renewed since that date?

A. Yes.

Q. How many employees, can you tell us, did the Company have on the payroll for the week ending May 20?

A. 259.

Q. 259. This included also the numbers you have given of engineers, office and administrative—

A. Yes.

Q. —buyers, and so forth?

A. Yes.

Q. How many employees did the Company have for the week ending May 27?

A. 265.

Q. How many for the 4 or 5 weeks subsequently, Mr. Needham?

A. On the week ending June 3 we had 285 employees. The week ending June 10, we had 288 employees; On June 17, 294 employees, and on the week ending June 24, 284.

28) The June 26 meeting was a short one. The Company maintained that its position hadn't changed and that it now had a full complement of men at work. The Union would not agree to what it characterized as complete capitulation to the Company's terms. Both parties agree that no progress was made at this meeting. Hart's testimony and the late Mr. Davidchik's testimony (as taken from Union Exhibit 12) both indicate that at some point during the June 26 meeting Gilker indicated he regarded all the striking employees as being discharged.

29) Both the Company and Union filed unfair practice charges against each other with the National Labor Relations Board. The Union alleged violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act. The Company alleged violations of Section 8(b)(1)(A) of the Act.

The basis of the Union charge against the Company reads as follows (Company Exhibit 6):

> Since on or about May 17, 1961 the Employer has unlawfully locked out its regular employees, has changed terms and conditions of employment without collective bargaining and has discriminatorily offered and granted extra-seniority and higher rates of pay to replacements, all in violation of and disregard for its obligations under an existing collective bargaining agreement with the union which is the duly designated collective bargaining representative of its employees and all for the purpose of attempting to oust the said union from its status as collective bargaining representative and for the purpose of attempting to evade Employer's obligation to bargain collectively with the said union.

The basis of the Company charge against the Union reads as follows (Company Exhibit 7(d)):

> Commencing on or about May 11, 1961, the Union, through its officers and agents, intimidated, coerced,

> threatened and restrained the employees of the Employer by following employees from the plant, engaging in physical violence against employees, mass picketing, destroying property of employees, engaging in name-calling, and making threats to their persons and property, thereby restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

Union charges against the Company were withdrawn. A settlement agreement on the Company charges against the Union was signed and approved wherein the Union, although not admitting any violations of the Act, as amended, agreed to notify its members as follows (Company Exhibit 7(C)):

> PURSUANT TO A SETTLEMENT AGREEMENT approved by the Regional Director for the Eighteenth Region of the NATIONAL LABOR RELATIONS BOARD, and in order to effectuate the policies of the NATIONAL LABOR RELATIONS ACT, we hereby notify our members that:
>
>> WE WILL NOT ENGAGE IN mass picketing of any entrance of the SIOUX CITY DRESSED BEEF CO., Division of NEEDHAM PACKING COMPANY INC., plant.
>>
>> WE WILL NOT ENGAGE IN any physical attacks on non-striking employees.
>>
>> WE WILL NOT ENGAGE IN following, stopping, or attempting to overturn the cars of non-striking employees.
>>
>> WE WILL NOT ENGAGE IN throwing rocks, tiles, or other substances at the homes or cars of non-striking employees.
>>
>> All of our members are hereby notified that the Union disapproves of, and will not permit, any interference with, restraint, or coercion of non-striking employees and applicants for employment of Sioux City Dressed Beef Co., Division of Needham Packing Company, Inc.

> We will not in any like or related manner restrain or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

30) On July 5, 1961, the Union presented Grievance Nos. 1-A and 2-A in writing for the first time through the medium of a letter from Davidchik to Needham (Joint Exhibit 4) which reads as follows:

> Enclosed find copies of Grievances Nos. 1-A and 2-A that we are requesting be processed through the provisions of Section 33, of the Agreement between your Company and Local 721, UPWA, AFL-CIO.
>
> With reference to Grievance No. 1-A it has been previously processed through steps (1) and (2) of (c) of Section 33 and we are desirous that it be placed in step (3) of (c) of Section 33.
>
> As to Grievance No. 2-A since the Company was requested that it be processed in Step (1) of (c) of Section 33 by Anton (sic) Stamoulis in a telephone conversation with Mr. Needham on June 28th, 1961 and since Mr. Stamoulis was subsequently advised by Mr. Jesse Marshall, attorney for the Company, that the Company's position was that they would not discuss the grievance because the issue was a matter of unfair labor practice charges filed by the Union, pending before the N.L.R.B., we are advising you that we are withdrawing our charges that have been filed with the N. L. R. B. and are requesting that we immediately proceed to handle the matter in line with the provisions of Section 33 of the Agreement. We are further assuming that your answer to Grievance No. 2-A is negative insofar as steps (1) and (2) of (c) of Section 33 are concerned and are therefore filing a written grievance on this matter as provided for in (3) of (c) of Section 33.
>
> We are requesting an immediate reply as to your position with respect to the further processing of the above mentioned grievance and are willing to meet at your earliest convenience for the purpose of concluding this matter as provided in Section 33 of the Agreement.
>
> Awaiting an immediate reply, I remain

31) On July 11, 1961, in a letter from Needham to Davidchik, the Company declined the July 5 request as follows (Joint Exhibit 5):

> Please be advised that we are declining your request of July 5, 1961 to process certain alleged grievances. Your organization and members by your conduct have repudiated and terminated the labor agreement with this Company dated October 1, 1960.
>
> We decline to deal with your organization further because of your action and, moreover, do not recognize your organization as the majority representative of our employees.

32) On July 12, 1961, Davidchik wrote to Needham in a fashion that suggests he had not received Joint Exhibit 5 at the time. Davidchik's July 12 letter (Joint Exhibit 6) reads as follows:

> Under date of July 5, 1961 a communication was sent to you with reference to Grievances Nos. 1-A and 2-A requesting that they be placed in step (3) of (c) of Section 33 of the Agreement between your Company and Local 721, UPWA, AFL-CIO.
>
> Section 33 provides under (4) of (c) of this section that if a grievance is not settled within 3 days after it is placed in (3) of (c) of Section 33, that it be advanced to (4) of (c) of Section 33. Since we have not heard from you as to the above grievances since we sent our letter of July 5, 1961, and since the 3 day period provided in (4) of (c) of Section 33 has elapsed, we are assuming that your answer is in the negative and we are therefore requesting that you consider that Grievances Nos. 1-A and 2-A as pending in step (4) of (c) of Section 33 and are requesting that a meeting as outlined in (4) of (c) of Section 33 be held immediately for the purpose of handling the above mentioned grievances. We are prepared to meet for this purpose at any time.
>
> We wish to further state that in the event that we do not hear from you in the course of the next several days that we will consider your position to be again

> negative and in that event that the grievances be considered as having been processed through steps (1) through (4) of (c) of Section 33 and be pending in (5) of (c) of Section 33.
>
> Again requesting an immediate reply as to your position, I remain

33) Receiving no reply from the Company to Joint Exhibit 6, Davidchik again wrote to Needham on August 10, 1961, as follows (Joint Exhibit 7):

> The Sioux City Dressed Beef Company has been requested previously to process pending Grievances No. 1-A and 2-A in accordance with Section 33 of the collective bargaining agreement in effect between such Company and Local 721, United Packinghouse, Food and Allied Workers, AFL-CIO.
>
> No agreement with respect to Grievances No. 1-A and 2-A having been reached in steps one through four of the collective bargaining agreement as provided in Section 33 (c)(1) through 33 (c)(4) of such agreement, we hereby request arbitration of Grievances No. 1-A and 2-A in accordance with Section 33 (c)(5) of the Agreement. In accordance with Section 33(c)(5), we hereby give notice that the Union has designated Charles Fischer, as its member of the Arbitration Board, and the Union hereby offers to pay one-half the expense of the third arbitrator.
>
> We remind you that Section 33(c)(5) requires the Company within twenty-four hours to appoint its arbitrator and to give written notice to the Union. Would you please advise promptly as to the Company's designation.

The chronology from August, 1961, to the fall of 1964 is the history of successive steps in connection with the proceedings instituted by the Union under Section 301 of the National Labor Relations Act, as amended, to compel the Company to arbitrate. It is sufficient to note here that the Union lost in the Iowa District Court for Woodbury County and in the Iowa Supreme Court. The Supreme

Court of the United States then reversed the Iowa Supreme Court, as noted *supra,* and remanded for further proceedings.

One informal conference was held while the case was pending before the U. S. Supreme Court, involving Hart and Davidchik for the Union and Gilker and Marshall for the Company. Nothing was accomplished. Hart's testimony as to what transpired at this conference constitutes the only report in the record and will be discussed later in this Opinion.

The foregoing chronology is skeletal in nature. It is not intended to include reference to all relevant circumstances, events, testimony or exhibits. It should serve, however, as a highlighting background for more detailed consideration and evaluation.

The next section of the Opinion sets forth in order: 1) the grievance claims and relief requested therein; 2) the text of contract paragraphs pertinent to the issues in this proceeding, concluding with a brief statement of the parties' contentions (the supporting reasoning for such contentions is set forth in detail later in the Opinion); and 3) a statement of the issues to be decided in the instant arbitration proceeding, together with the Chairman's views as to the proper frame of reference within which the Arbitration Board must make its decision.

The Grievances, Pertinent Contract Paragraphs and the Issues Presented for Decision by the Board of Arbitration in the Instant Proceeding:

Grievance No. 1-A (Joint Exhibit 2), filed by the Union's Grievance Committee, requests the reinstatement of Antona Stamoulis with full seniority rights and pay for all time lost "because of the fact that he was improperly discharged."

Grievance No. 2-A (Joint Exhibit 3), filed as a general grievance, requests the reinstatement of all employees listed thereon (approximately 183) with full seniority rights and full pay for all time lost "because of the fact that they were improperly discharged."

Paragraph 33 of Joint Exhibit 1 bears the heading "Adjustment of Grievances." Its entire text is set forth below:

> 33. (a) A shop committee composed of not more than six (6) employees shall be designated by the Union for the purpose of handling grievances. Meetings between this shop committee and the Company representative shall be arranged between these two groups on a mutually satisfactory basis.
>
> (b) Any grievance must be presented within fourteen (14) days of the occurrence giving rise to such grievance, excluding the date of such occurrence, or within fourteen (14) days of the time the Union has knowledge, or should have had knowledge of such grievance, or it shall be considered completely waived.
>
> (c) Grievances shall be handled in the following manner:
>
> (1) Between the foreman and the aggrieved employee with or without the shop steward, provided, however, that the Union can bring the grievance if the employee involved refuses to file such grievance.
>
> (2) Between the general manager and the aggrieved employee with the department steward and/or the chief steward, or a member of the bargaining committee in the absence of the chief steward.
>
> (3) If said adjustment of such grievance shall not thereby have been reached, it shall be handled by the grievance committee, with or without a national representative of the Union, and designated Company representatives. At this stage, the grievance shall be presented in writing, and when and if settlement is reached, said settlement shall be written out on the back of the grievance sheets and signed by both parties.
>
> (4) If the grievance is not then settled within three (3) days, the shop committee may call on national rep-

> resentatives of the Union to assist in the settlement of such grievance.
>
> (5) In the event a dispute shall arise between the Company and the Union with reference to the proper interpretation of (sic) application of the provisions of this contract and such dispute cannot be settled by mutual agreement of the parties, such dispute shall be referred to a board of arbitration upon the request of the Union. Said board of arbitration shall consist of three (3) members, one of whom shall be appointed by the Company and one by the Union and the third member shall be appointed by the two members so selected. In the event the two members first chosen cannot agree upon a third member within three (3) days after the second member has been chosen, either party may request the United States Mediation and Conciliation Service to submit a list of five (5) names. Each party shall alternately strike a name until one name remains which shall be the name of the third arbitrator of the dispute. Said Arbitration Board shall have authority only to interpret and apply the provisions of this contract. Its award shall be in writing and shall be binding upon the Company and the Union and upon the employees involved.
>
> The party requesting arbitration shall give written notice of that fact to the other party and shall in such notice furnish the name of its arbitrator, and the opposing party shall within twenty-four (24) hours thereafter appoint its arbitrator and give notice in writing to the other party. The parties shall divide the expense of the third arbitrator.

Also relevant to the issues in the instant proceeding are Paragraph 8(a), the "Management" paragraph which includes the right to suspend or discharge for just cause; Paragraph 9, the "No Strike or Lockout" provision; and sub-paragraphs (c) and (1) of Paragraph 19, the "Seniority" section of the agreement, which deal, respectively, with circumstances under which seniority is broken and the prohibition against doing bargaining unit work by employees outside the bargaining unit except under certain circumstances.

Paragraphs 8(a), 9, 19(c), and 19(1) are set forth below in the order listed:

> 8. (a) The management of the plant and the direction of the working forces, including the right to hire, suspend, or discharge for just cause, to assign to jobs, to transfer employees temporarily within the plant, to increase and decrease the working force, to determine products to be handled, produced or manufactured, the schedules of production, and the methods, processes, and means of production of handling, are vested exclusively in the Company provided this will not be used for the purpose of discrimination against any employee or to avoid any of the provisions of this agreement.
>
> 9. It is agreed that during the period of this agreement the employees shall not engage in and the Union shall not call or sanction any slow down, work stoppage or strike, and no lock out shall be inaugerated (sic) by the Company.
>
> 19. (c) An employee shall have no plant seniority until he has two (2) years of seniority. However, an employee with no plant seniority shall be accumulating plant service after he has completed his thirty (30) day probationary period. Plant seniority shall date from the original date of hire subsequent to which service has not been broken by any circumstances listed below:
>
> (1) Voluntarily leaves the service of the Company or is discharged for cause.
>
> (2) Failure to return to work when recalled or cannot be located upon reasonable effort on the part of the Company.
>
> (3) Has been in lay off status by the Company for a period of eighteen (18) months.
>
> 19. (1) No employee outside of the bargaining unit will be used on work of the same nature as that

> performed by employees in the bargaining unit where a result is to deprive an employee within the unit of work, except when a foreman must break in new operators on a new job, or temporarily in an operator's place who has failed to show up for work, or relieved due to injury or sickness.

The Company in its post-hearing brief cites one additional contract paragraph on "Working conditions," Paragraph 30, which reads as follows:

> 30. This instrument constitutes the entire contract between the parties hereto, and the Company, the Union, and its members will abide by it. Its provision and the rights of the parties shall in no way be altered by reason of any by-laws, rules, regulations or customs of the Union. The Company shall not be bound to grant any additional demands which may be made by the Union upon the Company, except to comply with the terms hereof.

No submission agreement was offered or attempted during the course of the hearings in November and December, 1964. A stipulation on the issues would have been difficult to arrive at because of the basic positions of the parties.

The Company urges here the same central thesis which caused it to refuse initially to comply with the Union's request that the grievances be arbitrated. In the Company's view, the Union and the employees must be held to have completely repudiated the contract, and particularly Paragraph 33, by their course of conduct from May 9, 1961 to July 5, 1961. The Company's secondary contention on arbitrability is that, in any event, the grievances were not timely filed in terms of Paragraph 33.

The Company asserts vigorously its legal right to replace employees who participated in a strike that the Union concedes was a violation of Paragraph 9 and urges that if it had not restaffed the plant its economic losses would have been tremendous.

In the Company's view, therefore, the sole issue before the Arbitration Board is one of arbitrability which, in the light of the fully developed record, must be held to require an award denying both grievances.

The Union's view of the issues for determination is necessarily markedly different in terms of its basic contentions. As presented first at the hearing by Richard F. Watt, principal counsel for the Union, and subsequently in the Union's post-hearing brief, there are five issues to be decided by the Arbitration Board as follows (Union brief, pp. 118-119):

1) Were the grievances presented timely?
2) Are the grievances arbitrable?
3) Was the Stamoulis discharge justified?
4) Was there just cause for discharging the other employees or, expressed somewhat differently, was there justification on the Company's part in considering that the men, by their actions, had terminated their employment relationship with the Company?
5) To what remedy are the aggrieved employees entitled?

The parties are at least in full agreement that the Board of Arbitration must concern itself with the arbitrability issue in its various facets. Of central importance in a decision of this issue is the evaluation of the relationship between Paragraph 33 and Paragraph 9 because in the instant proceeding we are now dealing with a "fully developed" record in contrast with the "undeveloped record," using the language employed by Mr. Justice Harlan quoted *supra* from Joint Exhibit 9.

The conflicting contentions of the parties as to arbitrability and substantive contentions raised by the Union as to alleged unjust cause for discharge and appropriate remedies therefor are indissolubly connected.

The Board of Arbitration must deal with an "omelet" of issues that cannot be neatly compartmentalized. The circumstances and happenings of the period between May 9 and July 5, 1961, are inseparably related to both the contentions as to arbitrability (or nonarbitrability) and the substantive merit (or lack or merit) of Grievance Nos. 1-A and 2-A. The problems must thus be studied and evaluated as an integrated whole. They cannot be dealt with *seriatim* as is possible in the orthodox grievance case raising both arbitrability and substantive merit issues.

The review and consideration of testimony, evidence, exhibits, and argumentation in this Opinion is based on the Arbitration Board Chairman's conviction expressed at the hearing that "the most relevant testimony and the most relevant evidence relates to the events and the conversations and the incidents and the meetings or the lack of meetings that occurred during the week of May 11 and subsequent weeks." (Transcript, p. 242). Arbitration Board members Fischer and Marshall, at the Board's executive session on April 9, 1965, indicated that they shared the Chairman's view that the Board should endeavor to put itself in the position that it would have found itself in had the matters at hand been submitted to arbitration in the late summer or fall of 1961.

Such a posture is, of course, in line with the March, 1964, finding by the Supreme Court of the United States (Joint Exhibit 9) that the record before it did not reveal any circumstance that would warrant releasing Needham from its duty to arbitrate the instant grievances under the contract, and also that the passage of time since 1961 in no way affects such duty.

It is perhaps desirable (although probably unnecessary) to underline here that the Supreme Court made no finding that the instant grievances were arbitrable. **Its holding was simply that Needham was not released from its duty to arbitrate on the basis that the Union had breached the no-strike clause (Paragraph 9 of Joint Exhibit 1), in terms of the facts that were undisputed on the pleadings as the matter came before the Supreme Court.**

Testimony and evidence on the arbitrability issue and the Union's contentions that the grievances have substantive merit were fully developed and presented for the first time before this Board of Arbitration in the fall of 1964. **The Supreme Court's decision, however, makes it incumbent on the Board of Arbitration to evaluate such developed record** as if the matters had, in fact, been appealed to the arbitration step and heard on what might be termed a conventional time table.

In the light of all these considerations, and in accordance with customary practice when the parties are unable to reach a submission agreement on the arbitrable issue(s), the Chairman is taking the view that the decision on Grievance Nos. 1-A and 2-A should be framed in terms of a formulation that is broad enough to embrace conflicting contentions of the parties and the "mixed" nature of the issues, namely, as follows:

1) Under the contract between the parties, should Grievance No. 1-A be denied, or sustained in whole or in part?
2) Under the contract between the parties, should Grievance No. 2-A be denied, or sustained in whole or in part?

We turn now to a more detailed consideration of the pertinent testimony and evidence, followed by a full presentation of the contentions of the parties.

Summary Review of Pertinent Undisputed Considerations Relevant to a Determination of the Issues in this Proceeding:

In an effort to keep this Opinion from assuming astronomical proportions, the Chairman has set forth below in summary form, and largely in his own words, certain relevant findings that the record warrants in terms of essentially undisputed testimony and evidence. Such economy permits fuller consideration of certain critical matters in dispute.

The findings set forth herein are not necessarily listed in order of importance or chronological sequence. References to transcript pages and exhibit numbers are inserted only where deemed essential to full understanding.

Careful study of the entire record in this case shows that the following findings of fact are warranted:

1) Between October 1, 1960, and May, 1961, the parties resolved grievances in an "informal" manner, with no grievances having been reduced to writing.

2) Needham's resumption of active operational control of the Company on April 14, 1961, was characterized by an intensive managerial effort to raise production levels. This resulted in a doubling of production in about three weeks time. Needham's concern about the previous low production, about the time spent during working hours in handling grievances and his dissatisfaction with the way labor relations matters had been handled during his absence due to illness were freely admitted by him and made known to Stamoulis, Hines, and other local Union officials and employees.

3) The walkout of May 9, 1961, was an illegal work stoppage in violation of Paragraph 9, admittedly sparked by Needham's expressed unwillingness to meet with the

Union committee that morning or to honor an ultimatum to meet at 12:30 that day. Study of the record makes clear that Union committee members were concerned over the change in management's approach to grievance adjustment which contrasted sharply with the pre-Needham informal methods used by Kozney, Read and Maier. The record makes equally clear that the Company on May 9 proposed an approach to grievance adjustment that was consistent with the requirements of Paragraph 33. It is also clear from the record that Hines on more than one occasion made reference to "hitting the bricks" and that Weathers made reference to the effect that the Union wasn't going to arbitrate any and all grievances. The record further establishes that some of the grievances raised on May 9 and 10 were adjusted, that some were denied and that some were reduced to writing (3rd step of Paragraph 33) and answered in writing promptly by management.

4) The record is free from any significant conflicts in the testimony as to the events and circumstances of Monday, May 8; Tuesday, May 9; and Wednesday, May 10. The only exception to this generalization is Stamoulis' failure to recall a meeting with Needham on grievances on Monday, May 8. Needham's recall of this meeting was specific and in some detail. Stamoulis' failure to recall was general and not supported by the testimony of any other Union witness. The record, therefore, requires a finding that such a meeting did take place on Monday, May 8.

5) The record establishes that Gilker acted as chief spokesman for the Company on labor relations matters virtually fom the time he first arrived in Sioux City on the afternoon of Tuesday, May 9, 1961. He assumed the initiative upon arriving by calling Davidchik and Helstein to enlist their help in getting the men to return to work. Gilker set up the meeting with the Union committee for

the evening of May 9 at which time he served as spokesman for the Company in dealing with the approximately 22 matters brought to the Company's attention by the Union committee (see Company Exhibit 22, Gilker's handwritten notes and comments on the problems taken up).

6) The record discloses no disciplinary action referred to or contemplated by the Company in connection with the unauthorized walkout of May 9, 1961. The record also discloses a joint effort by the Company and local Union officers to notify all bargaining unit personnel to return to work on Wednesday morning, May 10. The Company, for example, sent out about 20 wires to those who had not been reached by phone.

7) The record discloses Wednesday, May 10, 1961, to have been a normal production day with no "incidents" of a labor relations nature.

8) Gilker's notes taken at the Tuesday night meeting (Company Exhibit 22) indicate that both the equalization of hours in the cooler problem (which led to the hot meal concern) and the problem of foremen doing production work (foreman setting up and trimming) were brought up by the Union committee on May 9.

9) The interchange on the morning of Thursday, May 11, involving Hines and Tucker and Gilker's instructions to Tucker conveyed to Hines via Tucker are not seriously disputed, nor did either party attempt to establish any integral connection between the hot meal demand and the subsequent controversy involving the assistant foreman working that led to the discharge of Stamoulis and the walkout.

10) Concerning the discharge of Stamoulis, the following facts appear to be established beyond dispute by the record:

a) Meyer did assign Miller to take the place of a bargaining unit employee shortly after the noon break and his action in so doing was protested by Stamoulis.

b) Meyer consulted with Gilker and received instructions to tell Stamoulis to go through the grievance procedure on this matter and to warn him that he would be discharged if he stopped the chain.

c) Stamoulis and Meyer argued on the kill floor about Miller's working on a production job both before and after Meyer went upstairs for advice.

d) Stamoulis did not himself stop the chain in terms of pushing one of the buttons. The record affords no help in determining who, in fact, did push the button. However, there is no question that the chain was stopped and that work ceased and that Meyer fired Stamoulis on the spot.

e) The record establishes that work resumed after Stamoulis, Hines and others on the Union committee went to the office to discuss Stamoulis' discharge and to seek his immediate reinstatement. The record makes equally clear that killing stopped again when the meeting between Company representatives and the Union committee broke up and it was evident that the Company had made clear Stamoulis was still discharged.

f) When killing stopped the second time on the afternoon of May 11, the record shows that the employees finished up the remaining work before leaving the plant. The record also establishes that most of the employees were advised individually by Meyer, accompanied by Maier, that they would be subject to disciplinary action if they walked out.

11) The record requires the finding that the walkout of employees on the afternoon of May 11, 1961, was in violation of Paragraph 9 of the contract. The record requires the further finding that said walkout indisputably retained its character of an improper wildcat stoppage between the

afternoon of May 11, 1961, when it began and the evening of May 16, 1961. (The nature and significance of the employees' failure to return to work following the night of May 16, 1961 is, of course, the critical issue in dispute here.)

12) The record requires a finding that Needham told Hart on Friday afternoon, May 12, 1961, that if the men did not return and he, Needham, began to hire he would not replace those hired who proved to be satisfactory. Needham's testimony and Hart's testimony are in agreement also that Needham indicated on May 12, 1961, that this would not be "another Wilson situation."

13) The record also requires the finding that Hart urged the Company on Friday, May 12, to give him "something to work with" in terms of prevailing on the men to return to work and that the Company did not in any way retreat from its original position announced shortly after the discharge of Stamoulis on the previous day.

14) The record indicates that the Company did not begin actively to recruit replacements for bargaining unit personnel until Monday, May 15. The record also indicates no contact between Company representatives and Union representatives from Friday afternoon, May 12, until Hart's call to Needham on the morning of Tuesday, May 16.

15) The record requires a finding that at Hart's request subsequent to Hart's conversation with Gilker, Davidchik called a special membership meeting for Tuesday night, May 16, the purpose of which was to urge return to work and that the membership did, in fact, vote to return to work on the basis described by Davidchik as the understanding reached by Gilker and Hart. The record also shows that this membership decision was reversed after Davidchik reported the terms stated to him by Needham over the phone that night.

16) The record shows mass picketing began the following morning, attended by considerable violence, threats and harassment of those seeking to enter or leave the plant. The record also shows that Hart, Helstein and the International Union regarded the situation as having changed from an illegal wildcat to an illegal lockout as of Tuesday night, May 16, in terms of Needham's conditions given to Davidchik. The Union proceeded to take various actions in accordance with this conclusion: For example, a paid advertisement was run in a Sioux City newspaper on June 19, 1961, at Hart's request. The ad, which incorporates the text of a letter from Hart to Needham of June 16, 1961, is in evidence as Union Exhibit 17 and is set forth in full below:

> AN OPEN LETTER TO: Stockholders of Sioux City Dressed Beef Company and Community of Sioux City
>
> The dispute between Sioux City Dressed Beef and Local 721, UPWA, is now in its sixth week. This dispute could and should be settled. It is hurting not only the company and union members but is also causing labor strife in Sioux City and therefore hurting the people of Sioux City.
>
> However, it cannot be settled until both parties are agreeable to sit down and negotiate their difficulties. The union has always been ready and willing to meet, but as of now has been unable to get the company to agree to meet.
>
> Following is a copy of a letter the union sent to the Company Friday, June 16.

June 16, 1961

"Mr. Lloyd L. Needham, President
Sioux City Dressed Beef Company
Sioux City, Iowa

Dear Sir:

The dispute between your company and Local 721, UPWA, AFL-CIO is now in its sixth week. It is causing a hardship not only on the company and the union but also on the community of Sioux City as well. The differences which divide us cannot be resolved until such time as both parties are willing to sit down and discuss them. I am confident that if such a meeting were held, an equitable agreement can be reached.

The union again states that it is willing to meet with the Company at a time convenient to you, either alone or with a mutually agreed third party acting as a mediator in an effort to resolve this dispute.

Very truly yours,

Dist 3, UPWA, AFL-CIO"
/s/ Dave Hart,
Director.

Certified
No. 903665

If Mr. Needham continues to insist that he will not meet and that he intends to break the union regardless of the cost to the company, the employees and the community of Sioux City, Mr. Needham alone will take the full responsibility for the continuance of this dispute.

Membership of UPWA Local No. 721
(Sioux City Dressed Beef)
Dave Hart, *Director*

17) Needham answered the Hart letter of June 16 on June 19, 1961, the same day the ad just quoted appeared, indicating that he and Gilker could meet on June 26, 1961 (Union Exhibit 9). The suggested date of June 26 was confirmed by Hart in a letter to Needham dated June 20, 1961 (Union Exhibit 10). Needham replied to Hart on June 21, 1961 (Union Exhibit 11) confirming time and place for the June 26 meeting and concluding with the sentence, "We note that we will be meeting not only with the officials of Local 721 but with you in your official capacity as district director of the International Union acting for that Union."

18) Both parties agree that nothing was accomplished at the June 26, 1961 meeting, with the Company maintaining the same position indicated to Davidchik by Needham on the night of May 16.

Detailed Statement of Testimony on Critical Disputed Points:

In the Chairman's judgment, the disputed matters of most critical importance to a decision of the instant two [illegible]ievances include the following:

1) The circumstances connected with the discharge of Stamoulis on May 11, 1961.
2) The nature and content of the phone conversation between Hart and Gilker on the morning of May 16, 1961, and the phone conversations involving Hart, Gilker, and Helstein on May 17, 1961, together with the Needham-Davidchik conversation on the night of May 16, 1961.

In considering these disputed matters, the Arbitration Board Chairman believes it is essential to quote directly from the testimony rather than to attempt to condense into his own words.

1) *The Stamoulis Discharge.*

Although Gilker observed through the office window the altercation between Meyer and Stamoulis on the kill floor, the Company's case against Stamoulis rests basically on Foreman Meyer's testimony. Meyer testified on direct examination that prior to May 11, 1961, his relations with Stamoulis had been "fair and friendly." (Transcript, p. 28.) Although his testimony is not entirely clear as to whether on the afternoon of May 11 he was one or two men short when he put Miller on the line, nothing in the testimony suggests that Meyer at the time was not at least one man short (due to the failure of Skarnilus to return). It is also clear that it was customary to take an employee from the kill floor to help in the cooler pushing cattle.

Meyer's testimony on direct examination relating to the circumstances surrounding his discharge of Stamoulis is set forth in detail below (Transcript, pp. 33-38):

> Q. Now, what was your conversation with Mr. Stamoulis that afternoon?
>
> A. Well, I had to put the assistant foreman on the job when I put the man in the cooler to push cattle, to fill his position. Tony came to me and stated, "What the hell is that guy doing on the trim-out bench?" I says, "Tony, I am a man short in the cooler. I have to put this man in the cooler to push cattle."
>
> Mr. MARSHALL. Tony, is that Stamoulis?
>
> The WITNESS. Tony Stamoulis.
>
> Q. (By Mr. Gilker) Did Tony make any reply or say anything back to you then, Henry?
>
> A. Yes; he did.
>
> Q. What did he say?
>
> A. He says, "Well, what the hell is this fellow doing on the trim floor?" I said, "Because I have got to have a man on his job."
>
> Q. This Miller he was referring to, is that the assistant foreman?
>
> A. Assistant foreman at that time; yes.

Q. Did Tony Stamoulis say anything else to you right at that time?

A. He said to me at that time, "Either get that man off the chain or slow the chain down because he hasn't got any business working."

Q. He said, "because he doesn't have any business working"?

A. Working, yes, taking a man's place. I told him, "It is an emergency. I have got two men off that promised me to be back."

Q. Go ahead and tell us what you told him.

A. "As soon as he comes back, I will put him back up there where he belongs and Jerry Miller would come off the job."

Q. You say you had two men off. This man who had gone down to the city hall, when did he go down there?

A. He left at noon.

Q. He left at noon. When did he tell you he would be back?

A. He said, "I will be gone about an hour."

Q. Did he return in an hour?

A. He did not.

Q. Was it after that you had to put Jerry Miller up on the chain?

A. That is right.

Q. What did Mr. Stamoulis say? Did Stamoulis say anything further at that time when you told him that you were short some men?

A. He said, "I don't give a damn if you are short or not. You take Miller off of there." I told him again, "Tony, this is an emergency. We got to have the man on there to keep the chain rolling."

Q. Did he say anything else to you?

A. Yes. He said, "Cut the gang." I said, "Tony I can't cut the gang." It is almost impossible because you can't cut a gang where one man is gone on a chain like this. You can't cut the gang because there is a man off an operation; you almost have to cut the gang in half to have the man take care of two operations.

Q. Did you explain that to Mr. Stamoulis?

A. Yes; I explained that to Mr. Stamoulis.

Q. Did he say anything back to you?

A. He said, "You either get Miller off of there or we are going to stop that chain." I said, "Tony, don't be foolish. Don't lose your head. You have got no business to stop the chain because it is a case of emergency. When this man comes back, Miller gets off the chain."

Q. Was that the end of your conversation with him at that time?

A. Just right then it was. Then I couldn't satisfy Tony. He was mad so I came upstairs. I went upstairs. I talked to you, Mr. Gilker, Mr. Needham, and I believe Ernie Maier was in the room.

Q. Did you have any further conversations shortly after that with Mr. Stamoulis?

A. After I got through talking to you, I went down and told Tony, I said, "You are not going to stop the chain because you know better than that. If you have got a grievance, go through the right procedure and bring it up at a grievance meeting." He said, "To hell with that."

Q. Is that all he said?

A. No. Then he said, "God damn you, if you don't take the man off, I will stop the chain." I said "Tony, you know better than that." Then he said to me, "Hank, I am not afraid of you and that big fat son-of-a-bitch upstairs either."

Q. Stamoulis said that to you?

A. Stamoulis said that.

Q. Said he wasn't afraid of you and the big fat son-of-a-bitch upstairs?

A. That is just what he said.

Q. Who did he mean by that?

A. I believe Mr. Needham.

Q. You thought he was speaking about Mr. Needham?

A. That is right.

Q. Did you say anthing further to him at that time?

A. I said, "Tony, listen cool off. You are just mad." He said, "Are you going to take Miller off the chain?" and I said, "No." He went over and hollered, "Stop the chain," and the chain stopped.

Q. Did he raise his arm like you just gestured?

A. "Stop the chain" (indicating).

Q. What happened at that point?

A. I told Tony, "You are fired."

Q. Did he say anything to you?

A. He said, "You mean you have got enough guts to fire me?" I said, "Yes. It don't take guts to fire you after I explain everything to you, you still went over and stopped the chain."

Q. What did Mr. Stamoulis do at that point?

A. I believe he took off his clothes and started washing his apron and Emery Hines came on the killing floor.

Q. Did the chain stop—

A. The chain stopped.

Q. —when Mr. Stamoulis raised his arms?

A. Stopped right there.

Q. When the chain stops, does that mean all the operations stop on the whole kill floor?

A. Every operation stops.

Q. In other words, when one side of the killing floor stops, it stops the whole killing floor?

A. That is right.

Q. It is a continuous chain that goes around the floor?

A: Continuous chain.

Q. All the men on the killing floor were without work to do?

A. They are without work when the chain stops.

Q. Did you have a conversation with Mr. Hines at that time?

A. Mr. Hines came to me and said, "What did you you fire Tony for?" I said, "He asked for it." I explained to him what happened. "I told him what to do and he wouldn't listen and I fired him."

Q. You told that to Mr. Hines?

A. I told that to Mr. Hines.

Q. What was Mr. Hines' position?

A. He was the president of the Union.

Stamoulis' testimony on direct examination relating to the circumstances surrounding his discharge is set forth in detail below (Transcript, pp. 512-519):

> Q. Did you become aware sometime during that day that a foreman was working on the production job?
>
> A. Yes.
>
> Q. Can you tell us approximately when you became aware of it?
>
> A. I would say between 2 and 2:30 in the afternoon.
>
> Q. Will you tell us how you became aware?
>
> A. I seen him.
>
> Q. You saw him yourself?
>
> A. Yes.
>
> Q. Now, did you do anything with respect to the man's presence there right away?
>
> A. No.
>
> Q. Were you working at the time?
>
> A. Yes.
>
> Q. Did you continue on working?
>
> A. Yes.
>
> Q. What happened with respect to that man's presence thereafter, after you had seen him?
>
> A. Well, I waited approximately 15 or 20 minutes. I was approached by a couple stewards from the kill saying that the foreman was up there working, and it was our understanding that this wasn't going to happen again, and they wanted something done about it.
>
> Q. The stewards told you, in other words, that they had understood that this question had been disposed of by the Company's agreement to follow the contract; is that what you are telling me?
>
> A. Yes.
>
> Q. And how many people were you approached by, if you recall?
>
> A. I don't recall. A couple of them I know of.
>
> Q. What was your response to them? Did you do something or say something?
>
> A. I told them I would get hold of Meyer, Henry Meyer.
>
> Q. Henry Meyer?
>
> A. Yes.

Q. Did you contact Henry Meyer?

A. Yes. He was standing there.

Q. He was standing there?

A. Yes.

Q. This is on the kill floor?

A. Yes; in the room outside the kill floor. It is a big, large room. It is all open, but there isn't any killing done in this room.

Q. Did you have a conversation with Mr. Meyer?

A. Yes.

Q. What was that conversation?

A. I asked him why this man was up there.

Q. What was his response?

A. He said, "I need him up there. He is going to stay up there." I said, "Why?" He wouldn't give me an answer so I asked him for a first-step meeting with him and he refused.

Q. You asked him for a first-step meeting with him on the question of the presence of the foreman—

A. Right.

Q. And he refused?

A. Yes.

Q. What was the next thing that happened?

A. Then I asked him to go upstairs and find out if somebody upstairs would come down and I would discuss it with him, and he did this. He went upstairs and came back and said "No." I said, "Let me go upstairs and discuss it." He said, "No."

Q. What happened at that point?

A. Then I did ask him to slow the chain down to compensate for this man being off.

Q. His answer was—

A. "No."

Q. Approximately what time was it you had this conversation with him, do you recall?

A. I would say anywhere betwen 2:30 and 3 o'clock in the afternoon.

Q. Now, at the time that you had this conversation with him, where were you standing, this second conversation you report?

A. In the middle of the floor.

Q. In the middle of the kill floor?

A. Yes.

Q. Did that conversation continue on to other things? Was there more said there?

A. We both got a little excited, waving our arms and shaking our finger at each other, and just discussed this same thing. I said, "Get him off of there. He is not supposed to be there. Nobody was cut. Nobody was hurt."

Q. What were you trying to convey to him by saying "Nobody was cut, nobody was hurt"?

A. The fact that he was violating the contract by having this man up there.

Q. Is this the conversation that Mr. Meyer testified that he told you he was going to fire you?

A. Yes.

Q. How did that come about?

A. I told him, I said, "If he doesn't get off of there, I can't be responsible for what will happen." I said, "Anything can happen. These men are hot anyway from the previous day," and he said, "If anything does happen, you are going to get fired. If that chain stops running, you are going to get fired."

Q. You had said to him you could not be responsible for what the men did?

A. That is right.

Q. You had not said or suggested you were going to do anything?

A. No.

Q. Did the chain in fact stop?

A. Yes.

Q. Did you do anything, Mr. Stamoulis, to cause the chain to be stopped?

A. No.

Q. Did you yell to anyone to stop the chain?

A. If I did, they wouldn't have heard me anyway.

Q. Did you?

A. No.

Q. How close were you to the closest button at which the chain could be stopped?

A. Oh, I would say approximately between 30 and 40 feet.

Q. And the other buttons were at what distances from you?

A. They varied in distance. The closest one was between 30 and 40 feet; I imagine the furthest was a good 50 feet away.

Q. The chain stopped, Mr. Stamoulis. What happened then?

A. Mr. Meyer come up to me while we were just standing there anyway, and he said—. He talks in a broken accent. He was getting very excited. He said, "I like you," and he used some words which I am not going to repeat—

Q. I think for the purpose of the record, Mr. Stamoulis, I would appreciate if you would repeat it.

Chaiman Davey. Off the record just a moment.

(Discussion off the record.)

Q. (By Mr. King) Go ahead and repeat the language.

A. He said, "Goddamn it, Greek, I like you, but you are fired."

Q. What did you do at that time, Tony?

A. I just left, went back in the room where we wash our aprons, wash our equipment.

Q. Now, when he said to you something like, "Goddamn it, Greek, I like you, but I have got to fire you, you are fired," where were you standing?

A. Middle of the floor.

Q. Middle of the floor, and you just turned away at that point and went to wash you apron, is that correct?

A. Yes.

Q. Did you at that point or any other point on May 11 in the afternoon go into the cooler?

A. No.

Q. You did not go into the cooler to talk to Emery Hines?

A. No.

Q. You cleaned up your apron and then what did you do?

A. I went upstairs.

Q. What was the purpose of you going upstairs?

A. Thinking I might as well take a shower and go home.

Q. What part of the upstairs were you going to?

A. Locker room.

Q. Is it about this time or was it later or earlier that the people on the kill floor walked or came off their jobs?

A. It was approximately the time the chain stopped, they all started congregating in the middle of the floor.

Q. So we now have you placed at the dressing room.

A. Yes.

Q. What did you do up there? Did you take a shower?

A. No; they came in and said we had a meeting scheduled. They were going to meet with us.

Q. Who came in, do you recall?

A. I think it was Emery Hines.

Q. Came into the dressing room where you were and said there was a meeting scheduled with management?

A. Yes.

Q. Did you attend the meeting?

A. Yes.

Q. Do you recall who attended the meeting on behalf of the Union?

A. Yes; the whole committee was there.

Both Meyer and Stamoulis stuck fairly close to their direct testimony on cross-examination. Meyer could not recall where the two spell-out men were or what they were doing at the time he put Miller on the line (Transcript, p. 70). He confirmed that the kill and the line started up again during the meeting upstairs following Stamoulis' discharge (Transcript, p. 77). The kill stopped again when Hines stood at the top of the stairs and said, according to Meyer, "Quit killing. We are all going up to the Union hall. They won't take Tony back." (Transcript, p. 77).

Events from this point on are well covered in the chronology and will be treated again in consideration of disputed points in the discussion of Grievance No. 2-A.

2) *The Hart-Gilker Phone Conversation of May 16, 1961 and the Hart-Gilker and Gilker-Helstein Conversations of May 17, 1961.*

Of paramount significance in the instant proceeding is the question as to whether there was a telephonic understanding or agreement reached between Gilker and Hart in their phone conversation Tuesday morning, May 16, 1961, and if so, what was its nature. It seems desirable to summarize briefly once again the nature of the disagreement and then to let the testimony of the principals be quoted directly at this stage of the Opinion.

The Company contends that no agreement or understanding in the sense of a verbal contract was reached between Gilker and Hart on May 16. Needham testified that his position had never changed as to the basis on which the striking employees might return to work. He and Hart agree on at least one point, namely, that Needham stated to Hart on May 12 that this situation would not be "another Wilson situation." Needham and Gilker both affirm that it was always made clear to Hart and others from the Union that if the Company were forced to begin hiring it would not displace the satisfactory replacements (those who could "cut the mustard") to make room for returning strikers.

Hart testified that Gilker mentioned and that he, Hart, understood there might be some temporary difficulties in putting everybody back. However, he contends that Gilker specifically stated everybody would return with full seniority and agreed with his, Hart's, point that no more heads would roll, etc.

Hart stated (confirmed by Helstein in terms of what Hart told him) that Needham's terms, as stated to Davidchik the night of the 16th, constituted a flat repudiation of his understanding of that morning with Gilker. The Union stresses that no one on the Union side had an inkling of the Company's zero seniority terms until they were stated to Davidchik over the phone on the night of May 16. **Thus, in the Union's view, after having been informed by Davidchik that the employees were ready to resume honoring the contract, Needham himself repudiated the contract by interjecting the new hire qualification.**

Hart's version of his conversation with Gilker on May 16, as testified to on direct examination, is as follows (Transcript, pp. 624-625):

> Q. You reached Mr. Gilker, and what was the conversation between you and Mr. Gilker?
>
> A. I suggested to Mr. Gilker that we try to settle this thing. I said we should try to settle it and he agreed with me, and he asked me what I suggested. I said I suggested that everybody go back to work the next day, including Tony. He said Tony absolutely wasn't going back. He was fired.
>
> I said, "Well, tempers have cooled a little bit. I think I can persuade people for everybody's interest to go back to work and take up a grievance on Tony." He said, "This is okay." He said, "However, we do have a slight problem." I said, "What is the problem?" He said, "Well, there is about 50 or 60 people working in the plant now." He said, "However, some of them have come from the Fargo plant and will be returning. Others will not cut the mustard and, as you know, we were working 14 or 15 hours in the cooler and we were intending to enlarge the cooler," and he said, "I think we can get everybody back to work, but we can't do it right away. It will take a week or 10 days."
>
> I said, "This can be worked out, but I want it understood that everybody is going back to work with full seniority, that there will be no more heads roll, and that we will take Tony's grievance up through the grievance procedure."
>
> He said, "That is okay, but," he said, "I again want

to emphasize it will take a week or 10 days to get them back,'' and I said, "This will be worked out.''

Q. Did you say anything to Mr. Gilker in that telephone conversation as to what steps you would then take?

A. I said we would take it through the grievance procedure up to and including arbitration.

Q. But did you say anything with regard to the steps you would take in terms of getting the men back to work?

A. I said that we would call a membership meeting that night and then we would call Mr. Needham up and ask him when he wanted us to report or who he wanted to report first. We would call him that evening.

Q. Is that substantially all of your conversation with Mr. Gilker?

A. That is right.

Gilker's version of his conversation with Hart on May 16, as testified to on direct examination, is as follows (Transcript, pp. 852-860):

Q. (By Mr. Garner) Mr. Gilker, I believe you had just started testifying about the telephonic conversation between you and Mr. Hart on Tuesday, May 16, 1961.

A. Yes, sir.

Q. Would you give us as your best recollection the sum and substance and tenor of that conversation?

A. Well, Dave Hart called me concerning the situation out at Sioux City on that day. It was about 11 or 11:30 in the morning at the time we spoke. He called Lloyd and I returned the call, and when we were talking we talked about the Sioux City situation, the situation at the plant where the men had gone on strike on Friday, and Dave told me the men had calmed down to some extent. He thought he could talk a little sense to them, and I told him that we had 80 or 90 people in the plant, and he said, "No,'' we only had about 20 in the plant, and he told me if there were any more heads that had to be rolled there would be a revolution in Sioux City.

I told him that, knowing packinghouses, he knew that if the men went back to work immediately, there would be some of the 80 to 90 who wouldn't make the grade, wouldn't make it in a packinghouse because they couldn't do the work, didn't like it, and the quicker he sent the men back the less problems there would be and he— All through the conversation he never made any assurance he could get the men to come back. I urged him to get them to come back repeatedly, told him that the quicker the better, the less problem he and I would have. We could get together and attempt to resolve any problems and we could resolve them easier if he sent them back before there were more replacements hired.

That was the general gist of the conversation. There was absolutely no understanding or agreement. I told Dave that there were 80 to 90 men, and he disputed that. I told him he probably had a more accurate count than I had. However, I got mine from Mr. Needham. He said they had counted them. I told him I couldn't debate that with him, I didn't know.

We concluded the conversation that he would try to get the men to go back to work.

Mr. **Fischer.** I beg pardon, I think Mr. Gilker is referring to his notes again.

Chairman **Davey.** We have already established that he can do this at his own discretion without me being in any position to prevent him from doing it.

A. (Continuing.) He further told me that he thought we had been obstinate and he still wanted us to change Stamoulis's discharge to a suspension, and I told him I had been threatened with shutdown after shutdown and had had two or three different ones that week, and that we thought the discharge was proper and that I urged him to have the men go back, and he said if we insisted on a lot of heads rolling—the terminology he used—they would have to fight it out out there—referring to Sioux City. We told him if they would terminate their strike, we could resolve the problems, and we talked about a situation we had between us that we were both interested in down in

Omaha during our conversation relative to a petition another union had filed in a plant where they had bargaining rights, and I happened to be involved representing the company. Briefly, there was probably 2 or 3 minutes' conversation about that. We had not spoken about that before, that particular situation.

I had made it very clear to Mr. Hart that the Company didn't plan to fire anybody they had to date hired while the men continued out on strike, if they could make the grade in the packinghouse. By that I meant if they could do the work and do the duties they were assigned.

I urged him repeatedly to get the men back now before the problem got worse with more replacements.

Q. (By Mr. GARNER.) Why was the problem getting worse as the days went by?

A. These men had stayed out on strike on Friday, Saturday, and Monday, and Mr. Needham had started hiring people on Monday afternoon to report to work Tuesday morning, and Mr. Needham had told me on the telephone that he was getting—he was going to and was hiring people all through the day. Every few hours he would take on some men and he had more hired to come in Wednesday.

I told Dave Hart if they came in Tuesday there would be less men who would create obstacles regarding replacing people out on strike. I knew there would be more men reporting for work Wednesday than there were working on Tuesday, and if his men would get in there Wednesday morning those applications would not be accepted and there wouldn't be any more employees than there were on Tuesday.

I told Dave in the discussion even though they had 80 or 90 in there, probably half of them or better wouldn't make it in the packinghouse. If he got them back immediately, we would do everything we could to utilize as many of the new men—in other words, we spoke in terms of putting on a few more beef luggers to reduce the hours and that could use up a few of them and he wouldn't have a very serious problem regarding his people being replaced if he got them to come back to work Wednesday morning.

Q. Did you specifically tell him you didn't have the stick out for anybody?

A. I told him we didn't have the stick out for anybody. We weren't mad at anybody. We weren't intending to discriminate against any of the strikers.

Q. Did you tell him you wanted a smooth, long-range operation?

A. Yes, sir. I told him we wanted a smooth, long-range operation and it couldn't be obtained by them continuing to strike in violation of their no-strike clause over grievances that could easily be settled under the grievance procedure. That was the whole tenor of my whole conversation with him, our attempting to indicate to Dave an attitude of cooperation.

I indicated to him that Mr. Needham wanted to have a good relationship with them, but that we had to operate the plant and that by holding us down from Thusday night through Tuesday morning, we had suffered damage and that we needed to get in operation quickly, and that we were compelled to proceed to hire, and that as we hired our problem, the problem between the Union and the Company, became more and more serious because they had the problem of their men being replaced and the longer he waited to be firm with his men and insist they go back to work the more people there would be in there; consequently more of them replaced.

Q. Was the question of seniority even mentioned in the conversation?

A. No, sir.

Q. Was the question of the men not returning without a physical even mentioned?

A. No, sir.

Q. Was the question of the men returning without having to sign an application even mentioned?

A. No, sir. I told him I didn't think that either Mr. Davidchik or Mr. Hines had used the utmost, the top—all of their ability, persuasive influence to get the men to come back. I told him I felt that Mr. Stamoulis hadn't either, that they were talking out of both sides of their mouth. They were talking for the record when they told them to come back, but they were showing up out on the picket line in front of the plant and urging them not to go in. When we were hiring men, they were urging them not to go in.

Mr. WATT. This is what you told Mr. Hart?

The WITNESS. Yes, sir. That was the gist of it.

I thought that the people out here, Davidchik and Stamoulis and Hines, were not using their maximum persuasive ability to get the men to honor the no-strike pledge in the contract. I used the particular language that they were talking out of both sides of their mouth.

Dave didn't know whether he could get them to go back tomorrow, and I told him because we didn't know whether they were coming back tomorrow or a month from now or never, Mr. Needham was hiring people and he was compelled to hire people, and he told me, "Yes," they were a bunch of young kids, inexperienced, told me it was costly to train a new crew, and I told him we knew it was. We didn't want to do that. We wanted the old gang back, but it was out of our hands.

In fact, there was specific discussion between us that —I told him if we had to hire new crew, it would take weeks to get 400 cattle, but if the old crew came back we could get 900 cattle right away a day.

We discussed the fact that if he would send them back right away, a number of the men we had hired as replacements wouldn't make the grade in the packinghouse, and he agreed with me they wouldn't, and on a number of occasions I urged him to get the men back quickly as possible. I urged him to tell the membership to honor their agreement and quit pulling quicky strikes, and I pointed out to him that the only thing the Company got when it signed the contract was a guarantee on the part of the Union they would have peaceful and harmonious relations for the term of the contract, and that out here they weren't getting it.

I also told him that the men at Needham made more money than Swift and Armour people, and he told me, "Yes," they worked a lot of hours out here. I told him that there was a possibility— He said maybe too many hours they were working, and I told him that was a possibility, but that was something we could iron out once the men got back to work and we got the plant back in operation.

I told him that I had heard through the grapevine he had instructed them to go back to work, but Emery Hines didn't, and he said Emery wasn't very vocal, but Tony Stamoulis was pretty vocal on that.

We discussed about the condition of the men when they went to the Union meeting on that Friday night. I happened to do (sic) pay-day night, and he said they were in a pretty foul mood that Friday night, and I said probably a number of them had quite a bit to drink, and he said probably they did.

I specifically called to his attention the number of new hires we had on several occasions, but I told him that knowing packinghouses like he did and like I did, that both of us knew from our experience that it takes three or four or five new employees to make—in many cases to— In other words, you go through that many before you get one that stays there from here on out. Every new man we hired wouldn't constitute an obstacle to him if he got his men back right away.

I told him that wasn't a bad place to work. It was about the only air-conditioned kill floor in the country at the time. I didn't know of any others.

That is where we left it. There was definitely no agreement. He asked me where I was going to be. I told him I was going to be in my office except I was leaving my office and going to another city in about an hour and a half for another meeting. I gave him the number where I would be up there.

The Arbitration Board Chairman injected a question addressed to Gilker during his direct examination. It seems desirable to insert the question and Gilker's answer at this point as they appear in the transcript at pp. 872-874:

> Chairman Davey. I intend to ask Mr. Gilker whether he recalls anything from that conversation with Mr. Hart on Tuesday, May 16, that would have led Mr. Hart to reach the conclusion that you and he did have some kind of agreement or understanding.

The WITNESS. In fairness to Mr. Hart, I indicated to Mr. Hart I would attempt to work with them to work this problem out if they would live up to the contract and get the men back to work. We wanted the problem solved. We didn't want any fight with this Union. We didn't start out looking for a fight. We were looking for a solution to work out a labor relationship everybody could live with and be happy with, and I was urging Mr. Hart to please send them back quick, now, right now, before more replacements were hired. He had us over a million-dollar barrel. A million dollars worth of products spoiling. We had to get in operation.

I urged Mr. Hart to send them back. I told him no matter what the problems were, I would work with him and try to alleviate any injury to anybody, and I told him that of these replacements that were in the plant, a number of them would obviously not make it in a packinghouse. As Mr. Needham testified, we hadn't screened them closely. They wouldn't like the work or wouldn't be able to do the work, and I told him I would personally use my best efforts and to try and keep the numbers of replacements who displaced other employees, the members of his Union, down to the bare minimum, and I knew Mr. Needham wasn't anti-union, wasn't mad at anybody; we wanted to get along with them, but they had us in a predicament where we had to take some action, and in fairness to Mr. Hart, I told him there were 80-some odd replacements in the plant, but I didn't think 20 or 30 would make it in a packinghouse, and I didn't think that created an unsurmountable problem that guys like Dave Hart and myself couldn't work out when the attitude of the Company was what it was, and if he would just handle his people, make them be reasonable and try to live up to the contract.

That is as close as we ever came. I had had dealings with this Union in other places. I had been in the trade union movement. I told him Lloyd Needham wanted to get along. Lloyd Needham told me when I got in here he wanted to get along, he thought maybe

> they were doing something wrong. He wanted me to take a fresh look at the situation and see what their problem was and try to help work out a solution, and I indicated to Dave that was our attitude, but there was no agreement.
>
> I made it crystal clear to Dave all the way through this conversation that we weren't going to fire the guys we had hired to replace, to operate the plant, if they could do the work and make it in the packinghouse. That was clear all the way through the conversation. It was brought up three or four times.
>
> We don't have anything to hide, Mr. Arbitrator. We want the truth. I will tell you why I made that recording. I was brand new with Mr. Needham, and when I walked in they were on strike and within a matter of a few days they were out again. Mr. Needham didn't know me very well, and I felt I had a tremendous burden and I needed to be careful and know exactly what dealings I had had with Mr. Hart so Mr. Needham—for his benefit so he wouldn't think I had made some crazy deal he didn't know anything about. That was what occasioned me making that transcript.
>
> I indicated to Mr. Hart all the way through it that the men they were compelled to hire to get back in operation would not be fired or shucked to make room for others who have been out on strike for about a week by now and refused to come back and refused to arbitrate their differences.

Gilker's reply to the Chairman's question as quoted above requires noting, at this point, that the Chairman of the Arbitration Board refused to admit four Company exhibits (identified as Company Exhibits 23, 24, 25 and 26) offered while Gilker was testifying. The first of these was identified by Gilker as a transcript of the May 16 phone conversation and the other three were identified by him as tape recordings made on Gilker's Stenorette machine of the May 16 Hart-Gilker conversation and two phone conversations of May 17 between Gilker on the one hand and Hart and Helstein on the other.

Union counsel objected when Company Exhibit 23 was offered and engaged in some preliminary cross-examination which brought out, *inter alia,* the fact that neither Hart nor Helstein were advised by Gilker that the conversations were being recorded (Transcript, pp. 837-838). After considerable discussion and argument between counsel both on and off the record, Company Exhibit 23 was again offered by Garner and rejected by the Chairman. Company Exhibits 24, 25 and 26 were similarly offered, objected to by Union Counsel, and not admitted by the Chairman.

Gilker's testimony quoted above was given after the lengthy debate had been concluded on whether Company Exhibits 23 and 24 (the May 16 transcript and tape recording, respectively) should be admitted.

The Chairman's reasons for rejecting Company Exhibit 23 (and for rejecting the ensuing three) appears in the record as follows (Transcript, pp. 839-841):

> Chairman Davey. As soon as I can get a word in I will say something. This is, for what it is worth, unusual in my experience so far as the type of exhibit is concerned. I don't like to think off the cuff on something I regard as fairly important, but I will.
>
> It seems to me that we ought to be consistent, and up to now we have had people testifying on both sides as to their individual recollections of what was said and by whom in various meetings. There was a meeting on May 9; there was a meeting on May 11; a meeting on May 12, etc.. Right up to this minute, everybody has testified in that frame of reference as to their best recollection.
>
> The only departure from that is the famous transcript of the Woodbury County injunction proceeding that came into the record—to repeat once more—largely at the instance of the arbitrator. Other than that, we have had direct testimony by people who were

actually involved in these proceedings. I think very definitely we ought to make the same rule as far as Mr. Gilker is concerned.

Now, as to this proffered exhibit and as to any question as to whether it constitutes evidence of some kind of infraction, either legal or ethical, I know you haven't agreed on the arbitrable issues, but I am damned sure one of the arbitrable issues is not whether there has been a violation of the Federal Communications Act. I don't think that is within the scope of my submission, but I do think Mr. Watt is on very sound ground objecting to the introduction of that type of exhibit.

Mr. **Garner.** Mr. Davey, if I may state, one of the crucial issues in this hearing is whether or not Mr. Gilker and Mr. Hart made and entered into an agreement on May 16, 1961. This tape is in Mr. Hart's voice. It is Mr. Hart speaking and it is Mr. Gilker speaking. This hearing body can listen to what Mr. Hart said, it can listen to what Mr. Gilker said and determine for itself. That is the best evidence of what was said at that time.

Mr. Gilker can testify all day long, and it is going to contradict Mr. Hart's testimony, as we well know, or I wouldn't have introduced it, but here we have got something in Mr. Hart's own words. Here is what Mr. Hart says. It is the best evidence of the conversation. Actually, the best evidence of all this hearing would have been if everybody had been tape recorded.

Chairman **Davey.** It might be the best evidence in one sense. On the other hand, Mr. Gilker has already testified that when the conversation took place he didn't inform Mr. Hart that he was recording it for posterity, so to speak.

Now, this case is similar to many that are heard by arbitrators in at least one respect, and that is the arbitration board will have to, on a number of points, make a judgment as to the credibility of witnesses, and there are going to be numerous places in the record where witness X will say one thing and witness Y will say another as to what in fact took place or what was said.

As I said before, all the testimony prior to this has been of the nature I described. The parties are testifying as to their best recollection of what was said. Now, the record already is sufficiently complete, it seems to me, to indicate that there is in existence a tape and a transcript of the tape. I would say that it was of such a nature as to make it logical, if he wishes to do so, for Mr. Gilker to use it to refresh his own recollection, but so far as the record before me is concerned, it seems to me that he ought to testify in the same way that everybody has testified as to what happened or did not happen.

Helstein first testified as to his conversation with Gilker on May 9, 1961 regarding the work stoppage on that day and then as to his conversation on May 11 when he informed Gilker he would send Hart into Sioux City the next day. Helstein's testimony on direct examination relating to his understanding from Hart and his recollection of his conversation with Gilker on May 17 is as follows (Transcript, pp. 687-692):

> . . . Dave Hart came into Chicago and attended those meetings. My recollection is that it was on the second day of the board meeting, on Tuesday, that Dave said to me he thought we had the Sioux City situation worked out, that in a telephone conversation he had reached an understanding with Mr. Gilker that everybody would return to work except Stamoulis, and that that case would be arbitrated immediately and that the other employees could return without any discrimination, that there was some delay going to be involved because of some people who had come in between, but that it appeared that we would have it all worked out in a week or 10 days or thereabouts.
>
> Q. Incidentally, just so the place of where you were at this time is fixed, where was the wage and policy conference being held?
>
> A. It was held at the Congress Hotel in Chicago—Pick-Congress is its full name.
>
> Q. After you had received this report from Mr.

Hart as you have indicated probably on Tuesday, which would be May 16, did you receive any subsequent report as to what was happening in Sioux City?

A. Later that day, Dave said to me he had had a call from John Davidchik and that John had told him that in spite of the fact that we had advised the Company the people were ready to return to work along the lines of the agreement reached between Hart and Gilker, that the Company was now taking the position that anyone returning to work would be subject to physical examinations and also that they were going to be selective in the people that came back.

This clearly, as Hart told it to me, was a violation of the agreement and understanding he had reported to me previously that he had reached with Mr. Gilker, and I suggested to him he try and get in touch with him.

Q. With Mr. Gilker?

A. With Mr. Gilker, yes.

Q. Do you know whether thereafter you had any conversation with Mr. Gilker?

A. Yes. Sometime on Wednesday, Dave Hart told me that he had contacted Mr. Gilker and that Gilker had indicated that there was nothing that either he would or could do about the situation, and that that was that.

I don't recall very clearly at the moment whether I talked with Mr. Gilker that night, which would have been Wednesday of that week. I don't have the date.

Q. That would be the 17th.

A. It was the night before the National wage conference opened. We had had a series of meetings with representatives from the various chains during the day, and I am not certain whether this was as a result of a call I placed or a call that Mr. Gilker placed to me that day, Wednesday, but in any event, I did talk with Mr. Gilker on the phone Wednesday night relatively late from my room in the Pick-Congress. I was having a meeting there at the time when the call finally came through, and I talked with Mr. Gilker at some length.

Q. Would you relate what that conversation was, please?

A. Well, the conversation revolved around the question of the people getting back to work based on the agreement that Dave Hart had made with him, and Mr. Gilker indicated, among other things, well, there is nothing unusual about asking people to have physical examinations when they had been out of work for a while. I pointed out to him that the general practice where physical examinations were required at all, they were required only after periods of some layoff, that here you had had an interval of just a couple of days, and that it would hardly—one could hardly say this was in any way a practice in the industry.

I pointed out that the selective negotiation of rehiring was a clear repudiation of that agreement. The conversation got a little more heated as we went along, and I recalled for Gilker's benefit the fact that he had called me earlier the previous week and asked me to intervene in connection with the problem that existed when he needed at least time to get his feet on the ground, that I had done this and had done it apparently, at least for a short period of time, with some effect, and that it seemed to me that the very least we had a right to expect from him at this point was to see to it that the agreement he had entered into with us was implemented and kept.

There were some words exchanged in the course of this and among others was my telling Gilker I felt this was a complete double-cross on a commitment he had made, he was doing it knowingly, it was in keeping with the policy he had previously used in connection with another dispute where we had in Omaha thirty-some people discharged at one clip by a client Mr. Gilker represented, that this reflected the same kind of attitude he had displayed at that time, that we had worked the other one out only when I had been able to get together as a result of the president or at least the manager of it—I am not sure what his title was—and these people had been reinstated.

In the course of the conversation, I also said to Mr. Gilker that I thought it wasn't only a double-cross but was a clear case of biting the hand that fed them and a repudiation of some of the basic concepts that I thought he had been trained in, having once worked for a labor union that had made it possible for him to go to law school.

In the course of this discussion many other things were said. None of them got anywhere, and it was perfectly obvious that Gilker either could not or had no intention of doing anything about it, and I frankly assume that this was part of a plan which he had devised.

That was my last contact, so far as I know, with Gilker.

To complete the picture with respect to the disputed phone conversations of May 16, 1961 and May 17, 1961, it is essential to note certain testimony by Needham because, as Needham himself made clear on cross-examination, Gilker "wouldn't do anything without checking with me and I wouldn't do anything without checking with him in the way of making any kind of a deal." (Transcript, p. 402).

A lengthy excerpt from the transcript will be inserted here from cross-examination of Needham because, in the Chairman's judgment, a number of points vital to the argument of the parties are covered therein. The Chairman decided against employing the "three dots" technique (. . .) because this particular block of testimony is deemed too important to justify editorial cutting.

The following is taken verbatim from the transcript beginning on page 403 and concluding on page 420:

Q. Did you want the Union representative to get in touch with you or with Mr. Gilker?

A. Well, it would have been— In fact, if they had called me, I would have referred them to Mr. Gilker or talked to him myself before anything was done.

Q. Was there a point in time, Mr. Needham, in which you came however reluctantly to the conclusion that the men in the Union were not going to come to their senses?

A. No; I thought they would certainly, the way people were swarming in on us on Tuesday to go to work, I certainly thought it was getting so serious for them they had better do something quick.

Q. In other words, you thought that when the Union and the employees saw that a lot of new hires were being taken on and going to work that the urgent request you had made to them by means of your letter of May 12, Company exhibit 3, would at least begin to have some effect?

A. Yes. Their position was getting worse every hour.

Q. Their position was getting worse every hour?

A. So far as putting these people back in there.

Q. I see. So that each new hire that came on the job who was capable of doing the work was worsening the Union position because that new hire represented a spot in the establishment that the Union man wasn't going to get back?

A. Right.

Q. So it was just a matter of arithmetic for the Union to count what happened—

A. That is right.

Q. —until they realized that the jig was up?

A. Well, I can't speak for them, but I know how I would have felt.

Q. This was going on in your mind?

A. I know how I would have felt if I had been in their position.

Q. In other words, hiring the new men in addition to having the effect of getting you back in production, which you felt you had to do, was also really a very effective and plain-spoken message to the Union, wasn't it? Come to your senses quick.

A. Yes, sir; I think it should have been.

Q. It was, wasn't it?

A. With conditions, yes.

Q. They got the message, didn't they?

A. I think they did.

Q. That is what you wanted, wasn't it?

A. Yes, but they didn't want the message the way the letter instructed them that was put out Friday night.

Q. Oh, sir, how didn't they get the message the way you wanted?

A. They wanted to put everyone back.

Q. Who told you that?

A. Well, I do know from their conversations that they couldn't believe we had as many men in the plant as we had. That was the big problem. I feel as though they felt that way.

Q. And that was the big problem, the number of men in the plant as of Tuesday evening when you had these conversations with Mr. Davidchik?

A. I think that was the big problem in their mind. I think by Tuesday evening we had maybe 120 or 130 people in there at that time.

Q. Let's find out where the 120 or 130 people came from. Let's do some simple arithmetic, Mr. Needham. You hired 65 who reported to work on Tuesday?

A. We were hiring all day long that day.

Q. All day long?

A. Yes.

Q. How many did you hire the balance of Tuesday?

A. I don't have the figures, but I know we had at least 35 people at one time on the kill floor we didn't have a spot for. We couldn't place them fast enough.

Q. You didn't have a spot for. You mean—

A. Well, you have to have somebody that is a butcher take him over here and put a knife in his hand and say, "Do this."

Q. You mean you couldn't train them as fast as you wanted?

A. We couldn't train them as fast as they were showing up.

Q. And of those people that came in during the course of Tuesday, would the same proportion of them approximately ultimately turn out to be competent and acceptable employees as you indicated with regard to the 65 who reported for work on—

A. No. After they started to show up in such numbers, we did more sorting.

Q. So the calibre went up?

A. Right.

Q. A higher proportion of them ultimately turned out to be competent?

A. I don't mind telling you the first ones that showed up, the sick, the lame, the lazy, they all went. We didn't draw the line on the first ones that came in, but we soon had so many.

Q. You ended up with fewer midgets. Could you estimate as of June 26 how many of the 65 that came to work on Tuesday, May 16, and how many of the additional hires on Tuesday were still in your employ?

A. I would have to go back to the records. I don't have any record on that here.

Q. No idea at all?

A. No.

Q. There was quite a bit of turnover, wasn't there?

A. Yes; I would say the first week there was.

Q. On Tuesday morning, May 16, Mr. Hart called you, didn't he?

A. Yes.

Q. Didn't he say to you that he didn't think that this should be an all-out fight and that there should be a meeting to try to resolve it?

A. I don't remember. That was very short. I referred him right to Mr. Gilker, told him I would have Mr. Gilker call him or for him to get in touch with Mr. Gilker. I didn't much more than accept the call and I turned it back to Mr. Gilker.

Q. This kind of call is what you had been hoping would happen, isn't it? Didn't you want the Union to get in touch with you?

A. Yes; we had never refused—

Q. Mr. Hart may not personally have seen all the midgets going into your plant, but he had gotten the message somehow, hadn't he?

A. Evidently.

Q. He thought it was desirable to get in touch with you, didn't he?

A. Evidently.

Q. So that some of the measures you had taken which worsened the Union position were working, weren't they?

A. I think so.

Q. Why did you refer him to Mr. Gilker?

A. Well, he is our legal counsel on this thing and Lord knows, I had enough to do there at that time.

Q. Did you hope Mr. Hart and Mr. Gilker would work the matter out?

A. We would certainly be glad to hear what they had to say any time.

Q. But as of Tuesday morning when Mr. Hart called and you referred him to Mr. Gilker you were still hopeful that the men would come to their senses and all this horrible mess you had had for a few days would come to an end, weren't you?

A. Yes.

Q. Does that telephone call and the fact that you referred Mr. Hart to Mr. Gilker refresh your recollection at all as to when Mr. Gilker returned to Fort Smith?

A. No. I know he was there. When he left I don't recall.

Q. Does it refresh your recollection at all as to whether or not you had had any telephone communications with Mr. Gilker after he left Sioux City and returned to Fort Smith?

A. I don't think I did have.

Q. Your conversation with Mr. Hart we could characterize as a friendly conversation, Mr. Needham?

A. Yes.

Q. Was Mr. Hart conciliatory in his tone?

A. It was such a short conversation, I wouldn't want to judge that.

Q. It wasn't hostile, was it?

A. No. Mr. Hart has never been that way to me.

Q. About 8 o'clock or so on the evening of Tuesday, May 16, you received a call from Mr. Davidchik, didn't you?

A. Right.

Q. And Mr. Davidchik told you that the men had voted to come back to work and to have the Stamoulis discharge go through the grievance procedure?

A. Right.

Q. Did Mr. Davidchik say that he was calling you on Mr. Hart's instructions?

A. No; I don't recall that.

Q. Did he say to you anything about a conversation which he understood Mr. Hart had had with Mr. Gilker?

A. No.

Q. Wasn't the call Mr. Davidchik gave to you about 8 o'clock on Tuesday, May 16, wasn't this another good sign that the Union was coming around, Mr. Needham?

A. It was a sign, but—

Q. You had had two signs that day?

A. Yes; but the sign wasn't good due to the fact that— It was good in a way, but this problem of seniority on the men coming back was the big problem.

Q. You told them that there was a problem about that, didn't you?

A. Yes.

Q. Did Mr. Davidchik say that that made the Union's offer to return unacceptable to the Union?

A. Well, as I recall, he said, "I don't know whether they will accept that or not."

Q. Did he tell you that the man(sic) had already voted on returning to work?

A. No; he didn't say anything about voting.

Q. He didn't?

A. No.

Q. Why did you have to check with Mr. Gilker about the problem of the men in the plant?

A. Well, I didn't know whether he had had some conversation with Mr. Hart or Mr. Helstein while he was in Arkansas I wasn't up to date on, and I just don't operate that way. I never make a move without advice from my attorney in a situation like this. I always check with him before I make any kind of a move.

Q. You knew there was a pretty good likelihood Mr. Hart had talked to Mr. Gilker, didn't you?

A. I thought possibly he had.

Q. But you didn't know what Mr. Gilker had said to Mr. Hart or Mr. Hart to Mr. Gilker?

A. No. I know Mr. Gilker had told me in other conversations that we did have this problem of these men in the plant and I judged from his conversation that it was pretty much of a problem with Mr. Hart.

Q. Didn't Mr. Gilker tell you Mr. Hart had told him if it could be worked out over a period of days or weeks, so far as the replacement situation was concerned, that the Union would go along with this?

A. I don't know whether that was their conversation or not.

Q. Didn't Mr. Gilker ever tell you he and Mr. Hart had an agreement which they had arrived at over the telephone on Tuesday, May 16, with regard to the manner in which the men would return to work?

A. I have heard something to that effect; yes.

Q. Didn't you ever hear it from Mr. Gilker?

A. No.

Q. Now, let's back up and see what had happened as a matter of progress in these few days, Mr. Needham. Had your position changed at all at any point?

A. Never.

Q. Never. But the Union's had, hadn't it, Mr. Needham?

A. Yes.

Q. It certainly had, hadn't it?

A. Yes.

Q. First of all, they insisted Stamoulis come back, didn't they?

A. Right.

Q. Then they agreed that that would be handled as a matter of grievance, right?

A. Yes.

Q. First they had wanted the discharge to be changed to a suspension when Mr. Hart came in?

A. Yes.

Q. They abandoned that position, didn't they?

A. Yes.

Q. And then, so far as the question of the men coming back to work in connection with employees who had been hired by you, the Union was prepared to go along with a reasonable program of replacement, wasn't it, Mr. Needham?

A. I don't know whether they were or not.

Q. Mr. Gilker didn't report that to you, sir?

A. No.

Q. Mr. Davidchik said nothing about this to you?

A. With Mr. Gilker in Arkansas, I don't think he was up to date on how many men we had in the plant or how big the problem was. I probably told him when I did talk to him.

Q. All the more reason for you handling the matter rather than referring Mr. Hart to Mr. Gilker, wasn't it?

A. For me handling the matter?

Q. Directly with Mr. Hart.

Chairman Davey. I think, if I may interject, we are going at a fairly steady clip. We are also, in my judgment, beginning to get around to arguing with the witness instead of questioning him.

Mr. Watt. I won't argue with him.

Q. (By Mr. Watt) In any event, we are clear on one thing, Mr. Needham: Your position never changed and the Union's did change, didn't it?

A. Never changed in regard to these new men in the plant, no; and they had 5 days' time to think about it and were warned about it from the very beginning. This was nothing new that came up. They were warned all the way along.

Q. Did you ever talk to Mr. Helstein about this situation?

A. No.

Q. After Tuesday, May 16, and your conversation with Mr. Davidchik, when was the next time you ever spoke to any Union representative about the strike situation?

A. I don't think I ever talked to any of them until we had this meeting in June, I think.

Q. Am I correct in understanding, Mr. Needham, that it is your position that as of Tuesday, May 16, the Union had totally, completely, irrevocably, finally, and wholly repudiated the contract?

A. They didn't come back.

Q. That is not an answer to my question, sir.

Mr. Gilker. I object to the question. The facts will indicate repudiation, whether it was or was not.

Chairman Davey. We have certain exhibits in addition to the testimony. One of the exhibits—I can't remember the number—

Mr. Watt. I can find it.

Chairman Davey. —refers to the Company's statement of position.

Mr. Watt. That is correct.

Chairman Davey. Which I gather is Mr. Needham's position. I think the question, however, dealt with whether that was his position as of Tuesday, May 16, and I think that is an appropriate question.

Mr. Watt. Let me refresh his recollection with the exhibit. I think that may—

Chairman Davey. It is one of the joint exhibits, isn't it?

Mr. Watt. Yes; joint exhibit No. 5.

Q. (By Mr. Watt) Let me show you joint exhibit No. 5, Mr. Needham. The second sentence of the first paragraph reads, "Your organization and members by your conduct have repudiated and terminated the labor agreement with this Company dated October 1, 1960." That letter is dated July 11, 1961. What I want to know is, as of what point in time was it your position that the Union and its members by their conduct repudiated and terminated the agreement with the Company?

A. Well, the fact that they didn't come back to work Tuesday, I would say that would be the—or any time after they left the plant, they are repudiating the contract.

Q. But repudiating the contract in the sense that you no longer had any obligations under it even to arbitrate a grievance, when did that occur?

A. Well, I had no personal— This letter evidently was formulated to let them know our position.

Q. That is July 16, 1961.

A. Yes; that was after the meeting we had here in the hotel.

Q. Would it be fair to say it was your position that by reason of their position on June 26, 1961, the Union repudiated and terminated the agreement?

Mr. **Gilker**. I think the witness has already testified he considered it a repudiation on Tuesday.

Chairman **Davey**. The record will speak for itself.

(The last question was read by the reporter.)

A. The fact that they didn't come back on that Tuesday, I felt from then on they had repudiated it.

Chairman **Davey**. By "that Tuesday" you are referring to the May 16 Tuesday?

The **Witness**. Right.

Q. (By Mr. Watt) Was it their failure to return on Tuesday morning or sometime during the day on Tuesday or was it the failure of Mr. Davidchik to propose that they return on your terms on Tuesday? Which event on Tuesday is it?

A. Well, the fact that they didn't come back Wednesday would be clear in my mind they didn't intend to go along with our position.

Q. Which had not changed?

A. Which had not changed.

Q. But you testified on direct examination that after your conversation with Mr. Davidchik you didn't know where you were.

A. On Tuesday night?

Q. Yes, sir.

A. I didn't so far as the Union was concerned.

Q. Then you didn't know whether they had repudiated the agreement or not?

A. No. I just have to suppose it.

Q. This is surmise on your part?

A. Right.

Q. After Tuesday, May 16, did you hear from any sources at all that the representatives of the Union wanted to meet with representatives of the Company?

A. I don't recall.

Q. You testified about a Mr.—I can't remember the gentleman's name now, but the Union representative who spoke at the Chamber of Commerce.

Chairman Davey. The metropolitan council man?

Q. (By Mr. Watt) Helsinger.

A. He wasn't requesting anything from us at that time. He was requesting the Chamber of Commerce to get into the act and try and do something.

Q. He wanted them to mediate?

A. Yes.

Q. Didn't you hear directly or indirectly from other groups in Sioux City that the Union was trying to work out a way of getting together with your representatives?

A. The only call I had was a call from a minister in town here that wanted to get into the act.

Q. This phrase, "get into the act," has a peculiar connotation to it, Mr. Needham.

A. I can clear that up by my answer to him.

Q. What was your answer to him?

A. I told him we had a National Labor Relations Board that is handling this thing and we also have the courts and I thought that was the place to settle it, not on the local basis here with that he was trying to formulate.

Q. In other words, following the last conversation you had with Mr. Davidchik on Tuesday, May 16, your position was that the matter should be handled through the official agencies, namely, the National Labor Relations Board and the courts?

A. Right.

Q. And not by some third person such as a minister or Chamber of Commerce or some other interested group endeavoring to bring the parties together for discussions?

A. Yes. It had gone too far to be on that basis.

Q. By Tuesday evening, May 16, it had gone too far, sir?

A. This was a long time after that when I heard from this minister. It wasn't near the Tuesday date at all.

Q. On Wednesday, May 17, were you still hopeful the Union would come to its senses?

A. Yes, sir.

Q. Thursday, May 18?

A. By that time we had almost a full complement of people in there. We had 265 people on our payroll that week and were only 20 short from a normal week the week before, and we didn't open the boning department.

Q. You were confident at that point all those replacements would turn out as good as all the employees you had since 1956?

A. I wouldn't say that.

Q. You would have been glad to get some of the old employees back?

A. Yes.

Q. On your terms?

A. If they had come to their senses, yes.

Q. And "if they had come to their senses" meant that the individuals should come back and apply as new employees, right?

A. Right.

Q. And take a physical examination?

A. No.

Q. How about their seniority, sir; what happened to it?

A. It would have been no problem the night I talked to Mr. Davidchik. He wanted to know why and I said I didn't want the men—for the old men coming back to have seniority over men at the plant, and I said, "There is only 1 day now. There isn't much of a problem." The men in the plant only had 1-day seniority over them then, but as time went on the problem kept getting worse.

Q. But after Tuesday, May 16, anybody who came back in effect came back as a new hire, didn't he?

A. Right.

Q. Whatever seniority he had in the plant by reason of service back in 1954, 1955, 1956, 1957, that would be subordinate in some sense to the seniority of the individual who had hired in on Monday and Tuesday?

A. Right.

Q. And that was your position, firm, final, and irrevocable, wasn't it, Mr. Needham? You never deviated from that, did you?

A. No.

Other Disputed Actions of Company and Union Representatives Between May 11, 1961 and July 5, 1961.

Running parallel to the major theme of the case are a number of "variations" on the theme not previously referred to in this Opinion such as the following:

a) Union testimony by Stokes, Jr., to the effect that Needham had made an offer to him and another employee named Zimmerman of super-seniority if they were among the first 25 striking employees to return to work on Monday, May 15, 1961. Stokes testified that he did report on Monday and signed a pad at the punch clock. He recalls that he was about number five on the pad (Transcript, pp. 706-707). Gilker denied any knowledge of a super-seniority offer (Transcript, p. 947).

b) Company testimony, through Needham, that Stokes and Zimmerman had been followed by several cars of Union men after work to Zimmerman's home and then taken to the Union hall, the clear inference being that they were threatened and coerced into not working (Transcript, pp. 216-218). Stokes denied that he had been threatened (Transcript, pp. 709-710).

The record also contains material on a number of controverted points that occurred subsequent to July 5, 1961, such as the following:

a) Company testimony and exhibits dealing with Union actions subsequent to July 5, 1961, designed to show a continuing course of conduct on the Union's part, such as

Company Exhibits 8, 9, and 11 dealing with NLRB charges in the First Region (Boston) which resulted in Local 575 of UPWA signing a settlement agreement wherein it was required and agreed to stop putting pressure on Needham customers to cease doing business with the Company, etc. This phase of the Company's case was objected to by the Union as relating to matters occuring since the Company's refusal to arbitrate and thus not germane to the issues before this Board of Arbitration.

b) Considerable testimony and a number of exhibits offered by both parties in connection with unemployment compensation proceedings involving some of the grievants in the instant proceeding.

The foregoing matters are referred to here as illustrative of a number of considerations that are not treated extensively in the Opinion because of the Chairman's view, *based on a study of the entire record,* that greater clarity and understanding will be achieved by a concentration of attention on the major theme of the case rather than upon what I have termed here "variations" on the major theme.

Contentions of the Parties: A Prefatory Note:

In this section of the Opinion we have summarized in some detail the contentions and argument of the parties. The main outlines of the principal arguments are clear from earlier discussion. The Arbitration Board Chairman has drastically condensed arguments of counsel, frequently using his own words in so doing, in the interests of a more economical Opinion. References to the post-hearing briefs are made, however, when quoting or paraphrasing directly.

The Chairman wishes to express here his appreciation to counsel for the Union and for the Company for the lucidity and excellent quality of their briefs. The need for condensation in this phase of the Opinion should be evident

When one considers that the Union brief is 200 regular-sized pages in length and the Company brief is 26 legal-sized pages in length.

Contentions of the Company:

The Company contends that Grievance Nos. 1-A and 2-A should be denied as nonarbitrable for the following reasons:

1) All grievants were admitted participants in an illegal strike in clear violation of Paragraph 9 of the agreement. It is a matter of settled law that participants in an illegal strike have no reinstatement rights. It is also well established that discharge is an appropriate penalty for employees who fail to repudiate an illegal strike or violent picketing related thereto, even though they may have been on sick leave or absent from work for other legitimate reasons at the time of the illegal strike (Company brief, p. 16).

2) No *unconditional* offer to return to work or to fulfill the Union's obligation under the contract has *ever* been made by the Union since the start of the strike on May 11, 1961. Even if Hart's version of his May 16 conversation with Gilker is credited, which it should not be, Hart's suggestion for returning the men to work was conditional upon each and every employee returning. Yet, as a matter of law, even economic strikers in a perfectly legal strike must make an unconditional application for reinstatement or it must be made on their behalf by the Union. Otherwise, the employer has a right to reject the offer to return to work.

3) In the face of repeated warnings by the Company representatives to the Union committee following the admittedly illegal walkout of May 9, the bargaining unit employees walked out illegally again only two days later. They did so after having been warned specifically and in-

dividually before leaving the plant that they were subjecting themselves to disciplinary action if they left their jobs. Furthermore, the strikers continued their illegal walkout in violation of contract after each of them had received Needham's letter of May 12 (Company Exhibit 3) advising them the Company would be compelled to operate and to hire replacements if they did not end their illegal activities.

4) In the face of all these warnings and notices by the Company, the employees persisted in attempting to secure their ends by flaunting the grievance procedure and using "muscle" instead. They repudiated the contract completely by their course of conduct from May 9, 1961 to July 5, 1961. Only after their illegal resort to economic pressure had visibly failed did the Union and employees belatedly attempt to return to the contract route by the obviously untimely filing of Grievance Nos. 1-A and 2-A.

5) Knowing full well the highly perishable nature of the Company's product and the consequent necessity for uninterrupted production, the Union and employees nevertheless engaged first in an illegal stoppage on May 9 for the sole purpose of attempting to force a grievance meeting at 12:30 rather than at 4 p.m. the same day. Then, after being enticed to return to work at the behest of their International President, the local Union officers nevertheless that same night at a grievance session with management threatened still further illegal work stoppages if their view on grievances did not prevail. Such threats were repeated on May 10. On May 11, Chief Steward Stamoulis threatened Foreman Meyer with shutting down the kill if Assistant Foreman Miller was not taken off the line. Stamoulis subsequently did cause the line to be shut down, although admittedly warned of the consequences by Meyer. Once more, the local Union committee and the employees violated Paragraph 9 of the contract by striking

rather than filing a grievance over Stamoulis' discharge. The next day the Union membership confirmed their illegal action by voting unanimously not to return to work unless Stamoulis was reinstated. They continued the strike into Saturday and all through the following Monday, May 15. During this period the Company had made repeated appeals to both local and international Union officers and appeals to each employee individually through letters urging their return to work and the resolution of differences through the grievance and arbitration procedures of the contract.

6) The employees' constant course of conduct, which included picketing entrances to the plant each morning and evening from May 12 on and attacks upon and harassment of those desiring to enter or leave Company premises until restrained from such violence by court injunction, was one that can only be held to have been complete repudiation of the contract, and particularly its grievance and arbitration provisions.

7) Distinguishing Drake Bakeries from the instant case, the circumstances of the Union's repudiation here are so complete and unequivocal as to require a finding that the Company is relieved from its duty to arbitrate on this fully developed record. The record contains an admission of an illegal strike, a flat refusal to arbitrate the Stamoulis discharge, picketing, violence and a continuance of said illegal strike and refusal to arbitrate differences over a period of some eight weeks (i.e., between May 11, 1961 and July 5, 1961). During this interval the Company found it necessary to hire and train a new work force to protect itself against tremendous economic losses. The Union and its members had to be enjoined by the Woodbury County District Court from committing further acts of violence and mass picketing and had to be compelled to enter into an NLRB settlement agreement. Referring to the language

of the Supreme Court's decision of March 9, 1964, a more classic case of "fundamental change in relationship" between the start of the illegal strike and the date of the written grievances could not have occurred (Company brief, p. 24).

8) Finally, as a procedural point, the Company protests the Chairman's rejection of four Company exhibits (i.e., three tape recordings of telephone conversations between Gilker and Hart and Gilker and Helstein made on May 16, 1961 and May 17, 1961, and a typed transcript of the Gilker-Hart conversation of May 16, 1961). The Company affirms that the rejected exhibits were admissible, pertinent and material to this controversy and constituted the best possible evidence obtainable on the conversations between the parties involved. The exclusion of these proffered exhibits, therefore, is regarded by the Company as an act that "could be prejudicial" to its case (Company brief, p. 26).

For all these reasons, the Company urges that Grievance Nos. 1-A and 2-A be denied.

Contentions of the Union:

The Union contends that Grievance Nos. 1-A and 2-A are arbitrable and substantively meritorious and should, therefore, be resolved in the Union's favor, with the bargaining unit employees being restored to their jobs, with all rights restored and a fair measure of back pay, for the following reasons:

1) Both grievances were timely within the meaning of Paragraph 33. The discharge of Stamoulis was grieved immediately. It was argued officially on May 11 and May 12, 1961, certainly the equivalent of the first two steps referred to in Paragraph 33. Since the contract has no time limit on the reduction to writing at the third step, the fact that Grievance No. 1-A was not presented in

written form until July 5, 1961, is of no consequence. The critical time factor in Paragraph 33 refers to presenting a grievance within 14 days of the "occurrence giving rise to such grievance" or within 14 days of the time the Union had knowledge or should have had knowledge of such grievance. Since the discharge of Stamoulis was protested *immediately* after it took place, there can be no serious question as to its timeliness.

Similarly, as to Grievance No. 2-A, the record establishes clearly that the Union did not have knowledge until the meeting of June 26, 1961, that *all* the members of the bargaining unit had been replaced or fired. Grievance No. 2-A was filed in writing within a few days after this meeting. In any event, the subject matter of what became Grievance No. 2-A when reduced to writing was indisputably the principal item for discussion in lengthy phone conversations between Hart and Gilker, Helstein and Gilker, Davidchik and Needham, etc., all of which took place within the 14-day period specified by Paragraph 33. Thus, there can be no question that the *purpose* of Paragraph 33 was fully satisfied and the grievance was subsequently presented in writing. Finally, the Union stresses that the Company did not raise the issue of alleged non-timeliness in its original declination to arbitrate.

2) As to arbitrability in terms of the Company's defense raised in the various court proceedings, the Union contends that this Arbitration Board is bound by the U. S. Supreme Court's determination that the dispute is arbitrable. "Only if the record may fairly be said to disclose facts which, had they been pleaded, would have caused the Supreme Court to reach a different result may this Arbitration Board find that the grievances are not arbitrable." (Union brief, p. 121)

3) The full record before this Arbitration Board reveals nothing of any significance as to the Union's alleged con-

tract repudiation which was not effectively encompassed within the pleadings submitted by the Company and hence already considered by the United States Supreme Court. Independently of this contention, however, the Union stresses that the fully developed record reveals repeated efforts by officers of the local Union and international Union to terminate what they regarded as improper conduct by members of Local 721 and the making of substantial concessions to meet the Company's demands in an effort to resolve disputes according to contract procedures and restore the situation to normal at the earliest possible time. At no point, says the Union, did the Union repudiate the contract (Union brief, p. 122).

4) The violence on which the Company lays such stress in its repudiation argument did not occur until *after* the Company had itself repudiated the agreed-upon terms for the return of the men to work.

5) The Stamoulis discharge was clearly not justified. The record makes clear that the Company made no investigation on May 11, 1961, or at any subsequent time to determine whether Stamoulis stopped the chain or caused it to be stopped. The discharge of Stamoulis was based purely on assumption. Furthermore, the record discloses that Needham had an "unreasoning dislike" of Stamoulis and was determined to be rid of him (Union brief, p. 122). Finally, the record supports the view that some of the incidents leading up to the events of May 11 were provoked by the Company, predictably if not deliberately, "by the headstrong determination of Mr. Needham to run things the way he wanted them, regardless of the contract, regardless of past practices, and regardless of the consequences." (Union brief, p. 122.) At the most, the record establishes only that Stamoulis made some "somewhat intemperate and possibly threatening statements" on May 11, 1961 (Union brief, p. 196).

6) As to Grievance No. 2-A, the record contains no support for a finding that all the rest of the bargaining unit employees should be discharged. Nor does the record support a conclusion that they had terminated their employment with the Company. On the contrary, the record does support a finding that the Company deliberately decided to provoke a rupture in order to attempt to break the Union (Union brief, p. 123). Needham's sudden announcement to Davidchik on the night of May 16 that all the men must come back as new hires violated the terms of the Gilker-Hart understanding. It was a cleverly-timed tactic to exacerbate the dispute (Union brief, p. 124). The Company from May 16 on repudiated the contract.

7) On disputed issues of fact, the Union stresses that the Company's case rests almost entirely on the testimony of Needham and Gilker. The Union calls the Board's attention to the fact that none of the management representatives who handled labor relations prior to Needham's return in April, 1961 (i.e., Kozney, Maier and Read) were called to testify, although all three had direct knowledge of some of the pertinent events. The Union also stresses the dual role of Gilker as both witness and attorney. This should operate to discount his testimony and render his credibility suspect, in the Union's view (Union brief, p. 189). Needham, the Union charges, deliberately lied under oath at least once (Union brief, p. 184) and did not mention in his testimony that Gilker had played him his tape recording of his conversation with Hart (Union brief, p. 90, referring to Transcript at p. 411). On several other matters, says the Union, the veracity of Needham's testimony was challenged by that of Union witnesses and such Union testimony was not rebutted by the Company. The Union contrasts the Company's reliance on Gilker and Needham with the Union's direct case which presented all the principal participants in the events in question with the sole exception of Davidchik who was deceased.

For all these reasons, set forth in much greater detail in its brief than it is feasible to do in summarizing here, the Union urges that the grievances be sustained and a fair measure of back pay directed.

Before closing this section summarizing the contentions of the parties, it should be noted that both briefs contain numerous citations and discussion of arbitration decisions, court cases and NLRB decisions that Company counsel and Union counsel deem relevant and persuasive in support of their respective positions. The Arbitration Board Chairman has taken due cognizance of all cited references in connection with his study of the entire record and the briefs.

Reasoning and Decision of Arbitration Board Majority:

As the Arbitration Board Chairman now proceeds to set forth the reasoning underlying the Award, based on his evaluation of the voluminous record in the instant proceeding, it is both desirable and essential to state some basic considerations that pertain to the decision-making process in this case.

First, it should be made clear that neither Arbitration Board member Marshall nor Arbitration Board member Fischer has seen or been consulted about the text and reasoning of this Opinion or the content of the Award. The nature and importance of this case is such that the parties were unwilling to stipulate that the third and impartial member of the three-man Arbitration Board should act as though he were, in fact, the sole arbitrator. However, the Chairman made clear during the hearing (Transcript, pp. 3-4) that he would not favor a proposed Opinion and Award nor would he make comments during the Board's executive session as to his evaluation of the record. Board members Fischer and Marshall fully respected the preferences of the Chairman and neither party registered any objection thereto. Thus, the text of this Opinion and Award was prepared by the Chairman acting alone.

The wisdom of following such a procedure should be evident. Board member Marshall clearly indicated in executive session his support for the Company's position and contentions. Board member Fischer made equally clear his support for the Union's position and contentions. Under these circumstances the burden of preparing a *majority* Opinion and a *majority* Award necessarily rested squarely and completely upon the Chairman as the third arbitrator.

This burden has been assumed and is fulfilled herewith. In the Award itself, Board members Fischer and Marshall are listed as concurring or dissenting, as the case may be, with the privilege of filing separate concurring or dissenting opinions if they elect to do so. It should be emphasized, however, that the decision (i.e., the Award) of a majority of the Arbitration Board is, pursuant to Paragraph 33, "binding upon the Company and the Union and upon the employees involved."

Second, the Chairman wishes to make crystal clear that *all* the testimony and *all* the exhibits and *all* the contentions regarded as relevant by the parties have obviously *not* been referred to in this Opinion and, in fact, *could not* have been without producing a dismayingly lengthy entity. The concentration here has been on the main stream of critical circumstances, as it appears to the Chairman *upon careful study and review of the entire record.* No part of this record went unexamined or unconsidered.

Third, the Chairman wishes to emphasize once again that, with the concurrence of the other two Arbitration Board members as expressed by them at the April 9, 1965, executive session, the reasoning and decision section of this

Opinion and the Award itself have been thought through, so far as it is humanly possible to do so, in terms of an assumption that this arbitration proceeding took place in 1961 rather than in 1964 and 1965.

Grievance No. 1-A will be considered first by itself, although the Chairman recognizes that the Company's contract repudiation argument technically applies to the Stamoulis grievance as well as to Grievance No. 2-A.

1) *Grievance No. 1-A.*

The timeliness issue as to Grievance No. 1-A can be disposed of in brief fashion. The discharge was grieved almost immediately. The Paragraph 33 requirement of grieving within 14 days of the occurrence was thus satisfied within a matter of minutes after the fact of discharge. It seems appropriate to consider the meeting on May 11, 1961, as the first step and the meeting of May 12, 1961, at which District Director Hart was present as the second step under Paragraph 33. Although an illegal walkout was in progress on May 12, 1961, no Company representative at that point indicated any intent of arguing the subsequent contract repudiation thesis.

The parties were indisputably stalemated on the Stamoulis matter as such between the time of discharge and Tuesday morning, May 16, when Hart and Gilker talked with each other by telephone. Although Needham and Gilker both testified that they had an impression that the Union committee left the conference room on May 11, 1961, to write up the grievance at the third step, it was admittedly not written up until July 5, 1961. In the Chairman's view, Grievance No. 1-A clearly did not thereby lose its contractual characteristic of timeliness.

The record supplies overpowering support for the proposition that the Stamoulis matter was *continuously grieved* at all times after the discharge occurred. It is also undeniably the fact that Paragraph 33 contains no time limitations applicable to reducing the grievance to writing at the third step or stage.

From a realistic standpoint, the record requires a conclusion that a lengthy gap or hiatus in the *formal* processing of the Stamoulis grievance did occur because of the admitted effort to force his reinstatement through an illegal work stoppage. Furthermore, from the night of May 16, 1961 down to July 5, 1961, the Stamoulis grievance *as such* visibly became inextricably intermeshed with the broader considerations ultimately raised by the subject matter of Grievance No. 2-A.

Somewhat ironically, had the illegal work stoppage of May 11, 1961, *not* occurred and had the parties proceeded through the first two steps and then clearly entered the third stage with positions on the discharge remaining the same, the grievance could have arguably been regarded as lost if it had not *then* been reduced to writing. But the "stage" referred to by Paragraph 33 as the one where the grievance "*shall* be presented in writing" (emphasis supplied) was not realistically reached because of the intervening effort to reinstate Stamoulis by the economic pressure of an illegal work stoppage.

In the light of these considerations, the Chairman is firmly of the view that under the somewhat unusual circumstances prevailing here Grievance No. 1-A cannot properly be regarded as waived because of untimeliness under Paragraph 33.

Grievance No. 1-A will now be considered on substantive grounds.

Stamoulis was discharged by Foreman Meyer on the afternoon of May 11, 1961, for causing the chain to stop after being concededly warned by Meyer that if he did so he would be fired. A comparison of Stamoulis' and Meyer's testimony as to the incident leaves no question in the Chairman's mind that Stamoulis told Meyer he would shut down the line if Miller was not taken off; that Meyer warned Stamoulis of the consequences of doing so and urged him to follow the grievance procedure; and that Stamoulis either by shouting "Stop the chain" or by an arm-waving signal did, in fact, cause the chain to be stopped by someone who was aware of the nature of the altercation between Meyer and Stamoulis and who was responsive to instructions from Stamoulis rather than from Meyer.

In the Chairman's view, the fact that Stamoulis could not himself have pushed any of the buttons to stop the chain is a consideration of no significant consequence. Stamoulis was Chief Steward of Local 721. He knew the contract and he knew his responsibilities under the contract in relation to the grievance procedure and in relation to Paragraph 9. The Chairman is convinced that Stamoulis sincerely thought that putting Miller on the line was unnecessary and that the situation was not an emergency one. This belief would explain his anger, but it does not excuse his action in causing the line to be shut down.

Stamoulis' denial of responsibility is not credible under the circumstances. His conduct immediately after being fired cannot be squared with his professed innocence. If Stamoulis had not caused the line to shut down, *he would have protested immediately the falsity of Foreman Meyer's assumption that he had.* He did nothing of the sort. Instead, by his own testimony, Stamoulis turned away, went to wash his apron and went upstairs thinking that he "might as well take a shower and go home." (Transcript, p. 518).

If Stamoulis did *not* cause the chain to stop and had intended instead to follow the grievance procedure over the matter of the foreman working, he would have taken *some* action to correct the erroneous impression among the line employees that he wanted the chain stopped, as well as to correct Foreman Meyer's impression. By his own testimony, as indicated *supra,* he did nothing of the sort.

The correctness of these inferences is amply supported by the entire tenor of the meetings between management and the Union committee on the Stamoulis discharge that occurred immediately afterwards on May 11 and the next day with District Director Hart present. The record contains nothing other than his own denial at the arbitration hearing to show that Stamoulis was innocent of the charge that he caused the line to be shut down. The whole argument on May 11 and May 12 centered on the Union committee's insistence that he be reinstated and the Company's remaining firm on the discharge. The demanded reinstatement was predicated on the assumption that there was no emergency requiring use of Miller on the line. This line of argument, as will be shown presently, would be germane only in connection with a properly processed grievance protesting Foreman Meyer's assignment of Miller to the line. The argument between management and union representatives on May 11 and 12 did not concern Mr. Stamoulis' guilt or innocence of the offense for which he was fired.

Thus, the Company's case against Stamoulis is not based on mere assumption as counsel for the Union seeks to maintain. As Gilker emphasized on cross-examination, the Union committee on May 11 and May 12 did not dispute the fact that Stamoulis had caused the line to shut down (Transcript, pp. 925-926).

The Chairman thus finds that the record amply supports the Company's contention that Stamoulis caused the line to be shut down on May 11, 1961, in open defiance of Foreman Meyer's warning and Foreman Meyer's authority.

Considerable testimony was adduced directed toward showing that Foreman Meyer did (or did not) confront an emergency situation on May 11, 1961, when he put Miller, his assistant foreman, on the line. This would have been material had Stamoulis elected to file a grievance instead of causing the line to shut down. It is *not* material to the question of whether the Company had just cause to discharge Stamoulis for causing the line to be shut down and is therefore not considered here.

The Chairman finds that the record amply sustains the Company contention that the discharge of Stamoulis was for "just cause" within the meaning of the contract. The Chairman also finds no convincing evidence that the penalty of discharge was excessive or arbitrary in relation to the offense and the circumstances. Stamoulis was no ordinary production employee. He was knowledgeable on contract procedures and Company working rules (Company Exhibit 1). *He knew the consequences of his acts.* He played a major role two days earlier in the illegal wildcat staged to protest the Company's refusal to meet with the Union committee on demand not later than 12:30 that noon. On May 11, no matter how strongly Stamoulis might have felt about the injustice and contractual impropriety of Miller's temporary assignment to the line, he knew the proper procedure was to grieve and he admittedly had full knowledge of the penalty he would incur by failing to follow the grievance procedure.

The record requires a finding that Stamoulis on May 11, 1961, was insubordinate and properly held to be responsible for the line being shut down.

Whether the Company should have acceded to District Director Hart's pleas that it change Stamoulis' discharge to an indefinite suspension (presumably with the length of disciplinary layoff to be worked out between the parties or through arbitration) is not a question to which this

Board of Arbitration should address itself in considering the merits of Grievance No. 1-A.

When reviewing a penalty in a discipline case, an arbitration board should not substitute its judgment for that of management as to the proper penalty. When cause for discipline has been proved, the penalty assessed should not be reduced unless the record establishes that the penalty was clearly excessive in relation to the offense or was clearly arbitrary, capricious or discriminatory.

None of these considerations has been proved in the Stamoulis case. The record on Stamoulis, therefore, requires an award denying his grievance.

2) *Grievance No. 2-A.*

As noted previously, the arbitrability and substantive merit issues are indissolubly linked when considering what is to be the proper disposition of Grievance No. 2-A on what probably all concerned will agree is now a "fully developed record."

The primary question relates to the Company's allegation that the fully developed record requires a finding that the Union's conduct released the Company from its duty to arbitrate. The Company contends that the record establishes that the Union and employees consistently declined to utilize the grievance and arbitration procedures of the contract for a period of nearly two months. Only after this continuous course of illegal conduct had manifestly failed did the Union attempt to avail itself of contract procedures. Such course of illegal conduct has been shown, says the Company, to have entailed a substantial amount of violence, and destruction of both Company and employee property which had to be enjoined by the Woodbury District Court. All this constituted an absolute and complete repudiation of the contract to the point of requiring a finding on the

fully developed record that the employees and the Union have waived any rights they might otherwise have enjoyed under the contract. Thus, with respect to No. 2-A, the Company contends that the employees went on strike in violation of contract; that they have remained on strike until the present time; that they have not attempted to return to employment; and that the Company merely replaced these people as they were able to hire replacements.

The Union does not dispute the fact that the work stoppage which began on May 11, 1961, was a wildcat in violation of Paragraph 9. However, the Union stresses the thesis that the nature of the situation changed fundamentally the night of May 16, 1961, when Needham told Davidchik that everybody taken back would have to return with zero seniority as new hires. Needham's ultimatum, says the Union, was tantamount to an illegal lockout. Its terms were a basic departure from and repudiation of the understanding reached between Hart and Gilker that same morning. In summary, the Union holds that the fully developed record, far from proving the Company's thesis of complete Union repudiation, in fact proves the reverse of this thesis. The Union stresses that the record demonstrates the following (Union brief, p. 160):

> No sooner had Mr. Davidchik told Mr. Needham that the members had voted to return to work—on what every responsible Union official and the members as well understood were the Company's terms—than Mr. Needham announced that, so far as he was concerned, they would come back as new hires, or not at all. Thus, no sooner had the Union renounced its unauthorized walk-out and acknowledged that the Stamoulis matter would be decided by the grievance procedure, and not by economic means, than Mr. Needham cast the contract aside, tore up its seniority provisions, and determined to deal with the men as though they were a bunch of applicants for jobs. As soon as the

> **Union made it clear that, in response to the Company's urgings and assurances and in accordance with the insistence of its own responsible leadership, it was going to live up to the terms of the contract, at that point the Company totally repudiated the contract, refused to recognize that the Union members were employees (but only job applicants with some kind of preference for hiring), and resolved upon a course designed to break the Union.**

Based on a searching study of the entire record, the Arbitration Board Chairman finds that Grievance No. 2-A should be sustained as to reinstatement and related rights but reduced as to back pay in a manner calculated to approximate a six-month disciplinary layoff for engaging in or refusing to disavow an illegal work stoppage which retained its improper character from May 11, 1961, until the night of Tuesday, May 16, 1961. A full statement of the reasoning supporting this holding will now be made.

The Chairman concludes that a crucial distinction exists between exercise of the legal right to replace strikers and to keep their replacements and telling such striking employees after they have voted to return that they will be accepted back only as new hires with zero seniority.

Needham is correct when he asserts that he always made the first point clear. He unquestionably indicated that if the illegal stoppage continued and he was forced to hire replacements, he would not displace any satisfactory replacements to make room for returning strikers. However, the record is barren of any indication that the second point (zero seniority and a new hire status) was ever explicated until *after* the Company was informed, through Davidchik, that the men were ready to cease their illegal stoppage, to put the Stamoulis matter to arbitration, and to return to work.

The Chairman finds that Needham had ample justification for taking severe disciplinary action against the wildcatting employees and any who were sick or on vacation who did not disavow the illegal stoppage. The terms of the Award which call for a penalty approximating a six-month disciplinary layoff without pay reflect this finding. However, the record does not support a finding that the Union or the employees had so totally breached the contract as to warrant the Company in regarding them as having terminated their relationship with the Company. The officers of Local 721 and the bargaining unit employees who walked out on May 11, 1961 did unquestionably violate Paragraph 9 by their walkout. Their purpose indisputably was to attempt to effectuate Stamoulis' reinstatement by such an illegal walkout instead of by utilizing the grievance and arbitration mechanism of Paragraph 33 of the contract. Such illegal and improper conduct continued until Tuesday, May 16, 1961, notwithstanding an effort to end the walkout by Davidchik, Hart, Helstein (and, in the Chairman's judgment, in a different and lesser degree, by Hines and Stamoulis).

On the night of May 16, pursuant to Hart's instructions to Davidchik, the membership met and voted to return to work the next day in terms of what Davidchik understood from Hart was a verbal agreement reached that same morning on the phone between him and Gilker.

Thus, between May 11, 1961 and the night of May 16, 1961, the stoppage was a wildcat in violation of contract, thus properly subjecting all involved to severe disciplinary action.

The Chairman also finds, however, that the entire character and tenor of the situation changed upon the verbalization by Needham to Davidchik of the new hire-zero seniority concept.

This brings us directly to an appraisal of the Gilker-Hart conversation of May 16, 1961, and particularly to a consideration of the drastically different actions that were taken by Hart and Gilker once they had completed the phone conversation.

What did Gilker and Hart do? Gilker phoned Needham. He played back to Needham the Stenorette tape of the conversation just concluded with Hart. In so testifying, Gilker flatly impeached Needham who had testified earlier on cross-examination (Transcript, p. 411) that he didn't know what Mr. Gilker had said to Mr. Hart or Mr. Hart to Mr. Gilker that Tuesday morning. Gilker's testimony, on the other hand, on cross-examination was as follows (Transcript, pp. 950-953):

> Q. But between your telephone conversation with Mr. Hart on the apparently the late morning of Tuesday, May 16, and that evening telephone conversation you had with Mr. Needham, had you spoken to any Company management personnel?
>
> A. Oh, yes: I had spoken to Mr. Needham after I had spoken to Mr. Hart.
>
> Q. Immediately after you spoke to Mr. Hart you talked to Mr. Needham?
>
> A. Yes, sir.
>
> Q. How long afterwards?
>
> A. Immediately I hung up, I called Mr. Needham.
>
> Q. You called Mr. Needham. That was your second conversation with Mr. Needham on Tuesday, May 16, is that correct?
>
> A. Yes, sir.
>
> Q. Your first conversation was the one in which Mr. Needham called you and said he was going to have Hart call you?
>
> A. I was to call Mr. Hart.
>
> Q. Or have you call Mr. Hart. The second one followed immediately?
>
> A. I reported back to Mr. Needham concerning my conversation with Mr. Hart.

Q. I take it while you were talking to Mr. Needham in that conversation immediately after your conversation with Mr. Hart, you had turned the Stenorette up so that tape wasn't running?

A. I played Mr. Hart's conversation back to Mr. Needham over the telephone; yes.

Q. Within a matter of minutes from the time you had spoken to Mr. Hart, Mr. Needham had a full playback of that conversation?

A. Yes, sir; so there wouldn't be any misunderstandings.

Q. After Mr. Needham had the benefit of that recording played to him over the telephone, what conversation did you have with Mr. Needham?

A. The next time I spoke to him was that evening, as I have just told you.

Q. You mean that in talking with Mr. Hart and having Mr. Hart's words on tape, all you did for the benefit of Mr. Needham was to play back Mr. Hart's and your conversation as it was on the tape without benefit of any further discussion between you?

A. Oh, no; we talked.

Q. That is what I am interested in. What was the talk about?

A. We were speculating between ourselves as to whether or not Mr. Hart would proceed to get the men back, and we discussed how we could minimize the replacement problem that already existed if he was successful, and Lloyd indicated to me he could put a few extra men in the cooler because we needed to cut the hours over there anyhow, and that the problem wouldn't be too serious if they came back the next morning.

Q. So that within minutes after you finished talking to Mr. Hart and Mr. Needham had heard the entire conversation between you and Mr. Hart, Mr. Needham and you discussed between yourselves such steps as the Company might take in order to facilitate the return of the men on the following morning?

A. Well, we weren't optimistic, Mr. Watt.

> Q. But you were ever hopeful, weren't you, Mr. Gilker?
>
> A. We never quit hoping because we wanted— As the testimony indicates, we didn't get any production that day, Monday or that day, and what production we did get was miserable. A lot of gored hides, damaged carcasses, and we were hoping that the thing could be terminated and we hoped the men would come back.

The record is clear that Needham knew when he talked to Davidchik that same night what Gilker had said to Hart that morning and what Hart had said to Gilker. It is also obvious from the record that what Needham told to Davidchik that night differed drastically from what Hart thought Gilker was saying to him that morning.

What did Hart do on the 16th after talking to Gilker? He called Davidchik in Sioux City and urged him to arrange a special meeting to urge return to work, arbitration of the Stamoulis matter, etc., as already related in detail *supra.* He also told Helstein that he thought he had the Sioux City matter resolved (see Helstein's testimony quoted earlier in this Opinion).

It is inconceivable that Hart would have taken these actions on Tuesday, May 16, if the Company's terms, *as expressed that night by Needham to Davidchik,* had been conveyed to Hart by Gilker that morning. If they had been, it is virtually certain that Hart's reaction would have been similar to what it actually was when Hart was informed by Davidchik of what Needham had said to him.

Gilker's testimony on cross-examination fully substantiates the fact that Hart received from Gilker that morning no inkling whatsoever about the Needham zero-seniority, new hire terms for returning employees. The pertinent portion of Gilker's cross-examination is set forth below (Transcript, pp. 946-947):

Q. (By Mr. Watt) On Tuesday, May 16, when you spoke to Mr. Hart, was anything said in that conversation by you to the effect that the men returning to work, whether or not their specific jobs had been replaced, would have to come back as new hires?

A. No.

Q. You anticipated that if the men came back promptly as a result of Mr. Hart's efforts, they would come back with their rights intact and without loss of seniority?

A. I didn't make any decision. I told Mr. Hart that we had no obligation to those men and I didn't make any decision because there was no need to speculate. I didn't know whether all were coming, part were coming, or none of them coming.

Q. But in connection with telling Mr. Hart that Mr. Needham didn't owe the men anything, you also told Mr. Hart Mr. Needham wouldn't discriminate against anyone?

A. That is right. He didn't have any intention of discriminating.

Q. But at that time when you assured Mr. Hart that Mr. Needham had no intention of discriminating against anybody, you didn't know about the little pad down at the plant on which the first 25 men signing in on Monday morning, May 15, would receive something extra by way of seniority, did you, Mr. Gilker?

A. I don't know about it now. I have heard about it yesterday.

The record does not permit a finding that Gilker was necessarily being disingenuous in talking to Hart on the morning of Tuesday, May 16, 1961. At the same time, if Gilker's testimony as to what he told Hart is credited completely and Hart's subsequent actions that day are also credited, the conclusion is inescapable either that Hart inferred far more from Gilker's remarks than Gilker intended *or* that Gilker was himself subsequently surprised by Needham's announced zero seniority intentions.

Whichever was the case, the record is crystal clear that what Gilker himself testified he said (or did not say) to Hart and what Needham later said to Davidchik are different in this one crucial respect relating to the new hire status of any returning employees.

Needham's testimony appears to support the conclusion that *in his own mind* he equated a policy of no replacement of replacements with zero seniority for any returning strikers. He appears to consider that what he told Davidchik on Tuesday night, May 16, was essentially the same as what he had written to employees on Friday night, May 12, in Company Exhibit 3. But it is undeniably a fact that what may have been in Needham's mind at all times was never verbalized to anybody on the Union side until Needham himself verbalized it to Davidchik the night of May 16.

In the light of these considerations and findings, it is the Chairman's firm conviction that Hart, Helstein, Davidchik and other Union officers and employees were completely warranted in their conclusion that Needham had breached the understanding that Hart had thought he had arrived at with Gilker.

From this time on, as the record abundantly demonstrates, things became considerably rougher. The Union and employees proceeded to engage in mass picketing, harassment of men reporting to work and publicizing the Union's conclusion that the situation had now become a lockout.

In a relatively short time, the Union's continuance of economic pressure, combined with efforts to secure third party assistance in mediation efforts, proved unavailing. The meeting of June 26, 1961 produced no results. The Union then resorted to the grievance procedure on July 5, 1961, and was confronted thereafter with the Company's contract repudiation thesis.

The Company stresses that there was no "understanding" or "agreement" between Hart and Gilker on May 16, 1961, *in the legal sense of a meeting of the minds.* It notes that Gilker at all times made clear to Hart that the Company would *not* replace the replacements and that the Company had no *legal* obligation to the strikers. Hart's testimony confirms that Gilker did emphasize these considerations. Much of their May 16 conversation dealt with how many had been hired and the problems of working the men back in without replacing the replacements. But, by his own testimony, at no point in the May 16 conversation with Hart did Gilker explicate the critical consideration that all men returning would come back as new hires and that some might not be accepted at all.

Also, *by Gilker's testimony,* on the morning of May 16 he and Hart were talking for the mutual purpose of resolving the dispute and getting people back to work. Gilker in all his testimony kept emphasizing that Needham wanted a good relationship with the Union. So did Needham in his testimony.

At the same time, however, Gilker, admittedly without Hart's knowledge or consent, taped his conversation with Hart. He also taped subsequent conversations with Hart and Helstein without revealing to either at the time that he was doing the taping. Furthermore, Gilker never revealed to anyone on the Union side at any time since (a period of some 3½ years) that such tapes had been made. Gilker also acquiesced in Needham testifying under oath that he, Needham, did not know what Hart had said to Gilker that morning, nor what Gilker had said to Hart. He then subsequently testified himself on cross-examination that *he had played the May 16 tape to Needham over the phone immediately after it was made.*

Upon re-reading the portions of the record relating to the proffer of the four rejected Company exhibits, the Chairman is convinced that his ruling excluding the exhibits was both sound and proper.

The Company argued that such exhibits are legally admissible and also that they constituted the best evidence of what was in fact said during the conversations in question. The fact remains that these tapes were taken without the knowledge or consent of the other parties to the conversation and their existence was kept secret until the fifth and final day of the arbitration hearing in December, 1964, after all participants in the taped conversations had testified except Gilker himself.

In the Chairman's judgment, the exclusion of these exhibits on the bases indicated by him at the hearing was proper under the circumstances. Furthermore, their exclusion can in no sense be regarded as prejudicial to the Company's case for two reasons: 1) the Chairman's finding relative to the content and significance of the May 16 Gilker-Hart conversation is in no way predicated on a discrediting of Gilker's testimony as to what was said or not said; 2) Gilker had a distinct advantage over Hart and Helstein in terms of refreshed recollection of the contents of the May 16 and May 17 conversations because Gilker had played over the tapes and read the transcript of the May 16 conversation shortly before the hearing. In fact, he had the latter in front of him as he testified. Such considerations are decisive against any contention of prejudicial conduct deriving from the exclusion of the exhibits.

Returning now to the night of May 16 and what followed, the Chairman wishes to make it perfectly clear that the violence, harassment and other improper actions attributed to the Union and striking employees subsequent to the night of May 16 were deplorable and are not to be regarded

as either excused or condoned. The Chairman has already found that the work stoppage beginning on May 11, 1961, was a violation of contract and employees, by engaging therein, were knowingly exposing themselves to severe disciplinary action by the Company. The Chairman also finds, however, that the terms for return to work, as stated by Needham to Davidchik on the night of May 16, altered the situation fundamentally. The Needham terms must realistically be regarded as approximating the discharge of the entire bargaining unit through the improper means of a total deprivation of seniority for participation in a wildcat strike.

It is true that management, if it chooses to do so, has a legal right to replace economic strikers engaged in a lawful strike and also to replace wildcat strikers. It is also true that wildcat strikers expose themselves to severe disciplinary action up to and including discharges. It may also be conceded, from a moral or ethical standpoint, that those engaged in a contract-violating wildcat ought not to enjoy a more favorable fate than those engaged in a legal strike.

Granting all his, the fact remains that the Company, in the instant case, right up to the time Needham stated his terms to Davidchik gave no evidence of intention to terminate the strikers in any fashion, either by discharge or by seniority deprivation. The strikers knew two things for certain between May 11 and May 16 in terms of what the Company had already made clear: 1) they were subjecting themselves to disciplinary action by striking in violation of contract, and 2) if the Company began to hire while they were still out, the new hires would not themselves be replaced as far as the Company was concerned. In reference to this point as to what the Union and the strikers knew and understood, one passage from Gilker's cross-examination is illuminating as to the contrast between the introspective legal thinking that went on in his mind as to the status of the strikers during the period in question *with the visible or overt actions and statements of the Company to which the Union could react.*

The passage begins on page 928 of the transcript and concludes on page 932 as follows:

> Q. Before leaving Thursday, May 11, did you instruct Mr. Henry Meyer and Mr. Ernie Maier what to say to the men as they were leaving or before they left the floor?
>
> A. Yes, sir.
>
> Q. I believe, as you testified, you wanted those two gentlemen to say to the men that if they walked out they would be subject to disciplinary action?
>
> A. Yes, sir.
>
> Q. The men did walk out, didn't they?
>
> A. Yes, sir.
>
> Q. Even though they had been given this type of warning by Mr. Henry Meyer and Mr. Ernie Maier?
>
> A. Yes, sir.
>
> Q. Were the men that walked out on that day ever subjected to disciplinary action?
>
> A. We replaced them.
>
> Q. What is the effect of replacing them, Mr. Gilker?
>
> A. Their status as an employee of course disappeared. We felt our obligation to reinstate them disappeared.
>
> Q. And as a man was replaced, one of the men who walked out, by a new hire, it was your contention that at that point he ceased to be an employee?
>
> A. His right to reinstatement was terminated.
>
> Q. The men were replaced in this sense by new hires, were they not, over a period of time?
>
> A. Yes.
>
> Q. Was there any procedure set up by Needham Packing Company whereby an individual, when his job was taken by a new hire, was advised that "New hire so and so has now taken over your job?"
>
> A. No. We had previously given them the verbal warning in a letter to their residence.

Q. That was the exhibit which I believe is Company exhibit No. 3, dated May 12, which the testimony here indicates some men received on Saturday, the 13th, and some men received Monday, the 15th?

A. Yes, sir.

Q. That letter spoke in terms of future steps to be taken by the Company, and what I am asking you now is whether as of the times when the Company took those steps which it had warned the men it would take it notified the individual employees involved that his or their job or jobs had been taken over by a new hire or new hires.

A. No, sir.

Q. But the disciplinary action that you said to Mr. Henry Meyer and Mr. Ernie Maier they were to warn the men about was disciplinary action of this nature, namely, their replacement?

A. We didn't know what the disciplinary action might be at that time. We had hopes there would be no necessity for any disciplinary action. I never decide in advance what the discipline will be.

Q. But it is your contention that by the actions of the Company subsequent to the date of the walkout, over a period of time the men were replaced by new hires and thereby in that fashion disciplined; i.e., their positions as employees came to an end?

The Witness: Could I have the reporter read the question back?

(The pending question was read by the reporter.)

A. I told Mr. Hart—to explain that answer; it isn't possible to answer "yes" or "no"—on the telephone in our conversation on Tuesday that Mr. Needham had absolutely no obligation to any of those men at that time because they were striking in violation of the no-strike clause and refusing to come back and process their grievances under the arbitration provision.

I am sure I haven't answered your question, but—

Q. (By Mr. Watt) I am quite sure of that too, sir.

A. I'm sorry. But that is as good an explanation as—

The WITNESS. If you will read it again, I'll take another shot at it.

Mr. WATT. Fortunately, I don't have to read it.

Chairman DAVEY. I would like the record to show on behalf of Mr. W. V. Hart that all through the proceedings he has done an excellent job of reading back questions and answers when requested to do so.

(The question referred to was re-read by the reporter.)

A. I believe possibly that is a matter of law, not appropriate to me as a witness, to argue possibly in brief.

Although the Union and the employees knew they were in the wrong from a contractual standpoint in terms of Paragraphs 9 and 33 between May 11 and May 16, they at no time gave any evidence of an intent to repudiate the contractual relationship between the parties as such, in the total sense alleged by the Company. Furthermore, from what Company representatives had stated between May 11 and the night of May 16, the Union and the employees had every reason to think the Company wanted to continue the contractual relationship in the manner prescribed by contract. Yet, if the Chairman may be permitted one homely analogy, just at the very moment the "prodigals" had informed the Company they were ready to return home and to proceed in accordance with the contract, the door is slammed in their face by Needham's zero seniority edict.

Needham was on firm solid ground from a legal standpoint when he began to exercise his right to hire on Monday, May 15, 1961,—*and the Union knew this.* It was Needham's initiation of hiring that caused Davidchik to call Hart; Hart to call Needham; and then Hart to call Gilker.

Whatever the discrepancies may be in the testimony of Hart and Gilker as to what transpired in their phone conversation of May 16, 1961, their testimony is in accord in the following significant respects:

1) Both Gilker and Hart are in accord that the sole purpose of their phone conversation on May 16 was to work out a basis for the return of the men to work and a resumption of normal contractual relationships.

2) Gilker made clear to Hart, which Hart's testimony acknowledges, that those hired by Needham on Monday and Tuesday who proved to be satisfactory would not be replaced to make room for returning strikers.

3) Hart made clear to Gilker, which Gilker's testimony acknowledges, that the return to work should take place with no discrimination and with no more heads rolling.

4) Hart's testimony showing he understood Gilker's point about the "problem" of the new men hired on Monday and Tuesday is confirmed by the testimony of Helstein and also by the late Mr. Davidchik at the unemployment compensation hearing.

5) Gilker's testimony and Hart's testimony are in agreement on the point that Gilker at no time in their conversation stated that the men returning to work would come back in the status of new hires with zero seniority.

With reference to the fifth point listed, Hart recalls that he used the phrase "with full seniority" as to the returning employees (Transcript, p. 625). Gilker's testimony was that he made no decision on this (Transcript, p. 947), but, as indicated *supra*, he substantiates Hart's point that nothing was said about the men coming back as new hires (Transcript, p. 946).

In summary, the Chairman of the Arbitration Board finds the record in this case to require the following conclusions as to the events and circumstances of May 16, 1961:

1) The Company, through Needham himself to David-

chik on the night of May 16, announced total deprivation of seniority as a condition for accepting returning strikers and further announced that some unspecified strikers would not be accepted back under any circumstances.

2) The Needham terms were indisputably different from those discussed by Gilker with Hart that morning.

3) Hart had been referred by Needham to Gilker. Hart had a right to assume that Gilker was speaking for management, to rely on what Gilker told him, and to take action accordingly.

4) Gilker's testimony confirms that he said nothing to Hart on the morning of May 16, 1961, about zero seniority, about filling out applications or physicals, or about selective refusal to take back some of the strikers based on Needham's exaluation of their conduct during the wildcat. On the contrary, Gilker assured Hart that the Company did not "have the stick out" for anybody.

For these reasons, in the Arbitration Board Chairman's view, Hart was completely justified in regarding Needham's terms to Davidchik as a breach or repudiation of his understanding with Gilker. *This conclusion is reached in terms of what Gilker himself testified he said (and did not say) to Hart that morning.*

The Chairman also takes note of Gilker's and Needham's repeated assurances that they were trying to work out a satisfactory long-run relationship with the Union. Needham's terms to Davidchik on the night of May 16 cannot possibly be squared with the Company's professed intentions of desiring a good relationship.

The Arbitration Board Chairman finds further that the record supports counsel for the Union in his summary conclusion that on the night of May 16, 1961, the Union's actions contrary to the contract ceased and those of the Company began in earnest (Union brief, p. 162).

The Company's terms for return, as announced by Needham to Davidchik, can now be related to the question of the arbitrability of Grievance No. 2-A. Between the time the men walked out illegally on May 11, 1961 and the time they voted to return and arbitrate the Stamoulis case, the Company may fairly be said to have had a grievance against the men and the Union of a most serious nature. The damage suit now pending in court is one reflection of this which is not our proper concern here. However, from the time Needham's terms for return as new hires were made known, the employees had a clear grievance against the Company. The only basis on which they could have returned was by a complete capitulation to Needham's terms. As already noted, these terms were themselves a violation of contract because of the blunt and manifestly improper use of total seniority rights deprivation rather than disciplinary action as such.

The employees, through Davidchik, had indicated clearly to Needham on May 16, 1961, that they were ready to abandon previously asserted positions and to abide by the contract. After hearing this from Davidchik, Needham nevertheless changed the terms for return suddenly and drastically from those his authorized spokesman, Gilker, had indicated to Hart that morning. In the Arbitration Board Chairman's mind, this Needham-to-Davidchik ultimatum is of decisive significance in requiring a holding that Grievance No. 2-A is arbitrable.

Needham's cross-examination by Watt, quoted at some length earlier in this Opinion (Transcript, pp. 403-420, particularly at p. 415), confirms that Needham in his own mind appears to have regarded Union and employee refusal to accept his Tuesday night terms unconditionally as approximating complete repudiation of the contract on the part of the Union and employees. Much of the Company's repudiation thesis rests on events and actions since May 16.

Yet the record requires a conclusion that Needham must assume a major share of the responsibility for what happened after the night of May 16.

To put the whole matter in its simplest possible terms, it was evident to Needham and Gilker that the Company had the Union and the employees on the run from the time Needham began to act on his announced intention of hiring other workers. Needham acting alone (or Needham and Gilker acting together) decided to demand what the Union counsel termed, with some justice, "unconditional surrender," having just learned from Davidchilk of his success in getting the Union membership to abandon its earlier untenable position and vote to end its unauthorized walkout.

Such consideration should serve to dispose completely of the Company thesis that the fully developed record supports a distinction between the instant case and Drake Bakeries. Up to the night of May 16, 1961, there is no significant circumstance shown in the fully developed record to warrant a finding that the Company was released from its contractual duty to arbitrate. After May 16, 1961, as already noted repeatedly, the onus for the exacerbation and prolongation of the dispute must rest on the Company's shoulders.

The fact that the Company succeeded in restaffing its plant completely in a few short weeks is a nonsequitur as far as the contractual question before the Arbitration Board is concerned. This is not the kind of "fundamental and long-lasting change" that the U. S. Supreme Court had in mind, as the Company brief would seek to imply. Company Counsel Gilker in his brief asserts as follows (Company brief, p. 23):

> "The developed record in this case now shows quite clearly that, while Local 721 persisted in striking and

> refusing to arbitrate its differences with the Company for a period of approximately eight (8) weeks, the Company was compelled to re-hire and re-train a complete, full staff of employees.”

The basic flaw in the foregoing thesis is that it ignores the fact that the dispute became a different breed of cat after Needham's ultimatum to Davidchik as to the terms for return.

Before this, the employees were clearly in the wrong and properly subject to severe discipline.

After this, the Company was in the wrong because the terms stated to Davidchik were a violation of the contract on the Company's part (i.e., total deprivation of seniority used as disciplinary weapon); were drastically different from Gilker's own version of what he told Hart that same morning; and, finally, were psychologically calculated to assure their rejection.

The record on what happened following Needham's conversation with Davidchik is clear in another important respect relating to arbitrability as well as to the merits of Grievance No. 2-A. Although it is beyond dispute that some employees and some officers of Local 721 engaged in the much-discussed violence, car tipping, and harassment and are properly to be condemned for such actions, it is also clear beyond question that the *only efforts made after May 16 to attempt to resolve the dispute were initiated by the Union.*

The record indicates that between May 17, 1961 and July 5, 1961, there was realistically, no way for the Union to proceed on a general grievance affecting the entire bargaining unit. *The conventional framework of Paragraph 33 became singularly inappropriate procedurally at this point.* Nevertheless, the Company knew full well the nature of what was being grieved from the fiery conversations of

Hart and Helstein with Gilker on May 17, 1961. Yet no meeting between the parties could be arranged until June 26, 1961. By this time, the plant had been completely restaffed. On June 26, 1961, the first meeting between the parties other than in court since May 12, 1961, it became completely clear that everybody had been in effect discharged. Gilker's testimony as to what he said at the June 26 meeting confirms this in substance (Transcript, pp. 929-930). Prior to this, Stamoulis was the only one who knew for a certainty that he had been discharged. No other bargaining unit employee ever was told or received a letter stating he was fired. Nor, as a matter of fact, did any employee ever receive any notification that he had been permanently replaced by a new hire.

Finally, it should be noted that the Company did not raise the timeliness issue until the Union went to court to compel arbitration.

There is also unrebutted Union testimony and evidence that the withdrawal of its NLRB charge against the Company was pursuant to advice that the Company would not entertain grievances while NLRB charges were pending against it.

All these considerations require the conclusion that under the circumstances as developed at length in the record and in this Opinion, Grievance No. 2-A must be regarded as timely filed.

The conclusion is also required upon the fully developed record, *and a majority of the Board of Arbitration so finds,* that Grievance No. 2-A on substantive grounds should be sustained as to reinstatement with full seniority and all other contractual rights restored, but with reduction of the requested back pay in a manner and for reasons now to be set forth.

The Union urges full back pay for all those named in

Grievance No. 2-A from May 16, 1961, to the date of their reinstatement. Anything short of full back pay, in the Union's view, would be less than the 2-A grievants are entitled to in the light of the evidence and the relevant legal doctrines. The Union recognizes, however, that this Board of Arbitration may feel disposed to moderate the back-pay remedy in the light of all the circumstances, including the passage of time and the psychological element occasioned thereby (Union brief, p. 196). Union counsel, therefore, suggests the possibility of "tolling" the Company's liability for the period of time when the present case was before the courts (i.e., deducting for the period February 13, 1962 through March 9, 1964). Compensation on the tolling theory would then be due from May 17, 1961 through February 12, 1962, and again from March 10, 1964, the day following the United States Supreme Court's decision, to the date of each employee's reinstatement. (Union brief, p. 197). The Union also proposes a mechanism for notifying grievants of their reinstatement rights, requiring them to signify their desire for reinstatement, etc. (Union brief, pp. 197-198).

The nature of the Company's contentions on Grievance No. 2-A appears to have precluded its making any statement or proposal regarding remedial relief. In any event, the Company's brief is silent on the matter.

The Arbitration Board Chairman wishes to state as firmly and as succinctly as possible two conclusions and findings on the back pay question:

1) As previously indicated at several places in this Opinion, the Chairman regards the conduct of bargaining unit employees between May 11, 1961, and the night of May 16, 1961, as inexcusable, in clear violation of Paragraph 9, and thus subject to severe disciplinary action.

2) Recalling once more that the Board of Arbitration

is considering this case as though it were being heard in 1961, the Chairman's view is that, on this fully developed record of circumstances that occurred between May 11, 1961, and the demand for arbitration on July 5, 1961, he would in 1961 have determined that a six-month disciplinary layoff would have been an appropriate penalty under the circumstances of this case and would have issued an Award in such terms.

The case is not being decided in fact in 1961. The Chairman thus finds himself in agreement with the rationale of the Union's "tolling" conception. This would relieve the Company of back pay obligations for the period of time that the case was before the courts. Thus, the Chairman's view on the appropriate back pay solution is framed on an assumption that had this arbitration decision actually been handed down on November 11, 1961, the Award on No. 2-A would have read in substance, "reinstatement with no back pay."

Since the Award in actuality is being issued on July 23, 1965, the back pay portion thus assumes the following characteristics:

1) No pay owing between May 11, 1961 and November 11, 1961.
2) Back pay owing between November 12, 1961 and February 12, 1962.
3) No back pay owing between February 13, 1962 and March 9, 1964.
4) Back pay owing between March 10, 1964 and the effective date of each grievant's reinstatement.

As to reinstatement procedure, the Chairman of the Arbitration Board takes the view that this Board of Arbitration has the authority to prescribe the precise mechanics to be followed if it elects to do so. The Chairman is, however, reluctant to spell out mechanical details in an Award which may, for reasons that the Chairman cannot anticipate at this writing, prove to be practically or technically difficult to execute.

With this consideration in mind, the Chairman has set forth below procedural guidelines that are feasible and which are to be regarded as the "outer limits" for effectuating the Award, with the understanding that any *modus operandi* that will facilitate greater speed is clearly permissible.

The procedural guidelines are as follows:

1) Each grievant listed on No. 2-A shall be notified by the Company at his last known address by registered mail, return receipt requested, of the terms of the Award and his rights thereunder. Such notification to grievants shall be made as quickly as possible but in no event later than September 1, 1965.

2) Grievants so notified shall inform the Company, with a copy to the Union, as to whether they wish to be reinstated. Grievant shall signify his intent as quickly as possible and in no event later than fifteen (15) days after receipt of the Company's letter.

3) All grievants signifying their desire to be reinstated under the terms of this Award shall be reinstated by the Company pursuant thereto as quickly as possible and in no event later than January 1, 1966.

In concluding this marathon Opinion, the Chairman wishes to explain why he has not alluded specifically to the many arbitration, court, and NLRB decisions referred to by counsel in their briefs. The Chairman has found such references valuable and instructive. He fully appreciates the research effort by counsel that is represented by the incorporation of these citations in their post-hearing briefs. However, the Chairman holds firmly the fundamental view that this Board of Arbitration is hearing and deciding two particular grievances under a particular contract. The decision must, therefore, be made in accordance with the record on the instant grievances under Joint Exhibit 1. Furthermore, the nature of this proceeding is obviously such that it qualifies for the favorite lawyer's characterization of being *sui generis*, which the Chairman translates into layman's language as a case that is in a class by itself. For these reasons, the Chairman has resisted the temptation to discuss the applicability or nonapplicability of other cases cited by counsel in writing this Opinion.

As a final postscript, the Chairman wishes to refer to the final conference between the parties, held in Arbitration Board Member Marshall's office while the matter was pending before the Supreme Court of the United States (see testimony of Hart, Transcript, pp. 637-639). (Gilker in his testimony also referred to this meeting briefly without contradicting what Hart recalls was said.)

According to Hart's recollection, the meeting came about at the instance of Marshall who called Harry Smith, the Union's local counsel in Sioux City, suggesting that the parties get together to try to resolve the dispute. The meeting took place in Marshall's office and was attended by Marshall, Gilker, Hart and Davidchik.

As Hart recalls, Marshall opened the meeting by saying that in a dispute that had gone on as long as this one, neither side could win a complete victory and there would have to be a compromise if the parties intended to settle the situation (Transcript, p. 638). Hart suggested that the Company return everybody back to work with full seniority. He indicated that when Gilker rejected this, he suggested that they abritrate the matter. Gilker also rejected this and Hart then asked him what the Company proposed.

Hart recalls that Gilker said the Company would take applications and, as openings occurred, it would place the men on a preferential hiring list, plus paying vacations to whoever had them coming. Hart inquired as to whether the Company would guarantee returning everybody within six months. Gilker replied negatively. No ground for agreement was reached and the meeting broke up.

The Chairman has summarized Hart's testimony as to this last meeting between the parties to underline what probably needs no underlining, namely, the proposition that in a dispute that has gone on as long as this one there can be no victor.

The Chairman has arbitrated many cases over the years in the meat packing industry. He is fully cognizant that labor relations in this industry, even under the best of circumstances, are not conducted like a Long Island garden party.

Nevertheless, the fact remains that the work stoppage which began May 11, 1961, was a clear violation of contract and inexcusable, no matter how "hot" feelings may have become over what must have appeared to the employees and the Local 721 officers as a 180 degree turn in managerial approach signaled by Needham's return to active control and the importation of Gilker. The six-month disciplinary layoff called for by the Award may appear harsh to some, but in the Chairman's considered judgment it is fully supported by the record.

By the same token, the Company's resort to contract violation as a means of bringing the employees to heel, so to speak, after the latter had unanimously voted to end their own contract-violating actions, is properly subject to condemnation in the strongest possible terms. No matter how great the Company's provocation might have been, two wrongs don't make a right in labor relations any more than in any other field of interpersonal relationships.

No decision by a Board of Arbitration coming more than four years after the events in question, but framed as though it were made in 1961, can fail to have disruptive consequences. The Chairman is fully sensible of this fact. However, the record in this case fully substantiates the findings and the terms of the Award on Grievances Nos. 1-A and 2-A. Whatever disruptive consequences may ensue from making the Award operational do not attach to the Board of Arbitration.

The Award on Grievances Nos. 1-A and 2-A appears on the next page.

AWARD OF BOARD OF ARBITRATION.

1. Grievance No. 1-A under the contract between the parties should be and is hereby denied.
2. Grievance No. 2-A under the contract between the parties is sustained in part and denied in part as follows:
    - a) All grievants listed in Grievance No. 2-A shall be reinstated by the Company with full seniority and other contractual rights restored, in accordance with the guidelines set forth in the concluding pages of the Opinion accompanying this Award.
    - b) The requested full back pay for grievants should be and is hereby modified and reduced to approximate the imposition of a six-month disciplinary layoff without pay for participation in or condoning of a work stoppage in violation of Paragraph 9 of the contract. The calculation of back pay due, less the disciplinary layoff penalty imposed herein, shall be made and

paid in accordance with the calendar guidelines set forth in the concluding pages of the Opinion accompanying this Award.

/s/ Harold W. Davey,
Harold W. Davey, *Impartial Arbitrator and Chairman, Board of Arbitration.*

Jesse E. Marshall, Company-designated Arbitrator (concurring as to Grievance No. 1-A and dissenting as to Grievance No. 2-A).

Charles H. Fischer, Union-designated Arbitrator (dissenting as to Grievance No. 1-A and concurring as to Grievance No. 2-A).

Arbitration Board Opinion and Award Issued and Signed by the Chairman in Ames, Iowa, July 23, 1965.